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ONTARIO LABOUR RELATIONS BOARD REPORTS



October 1988



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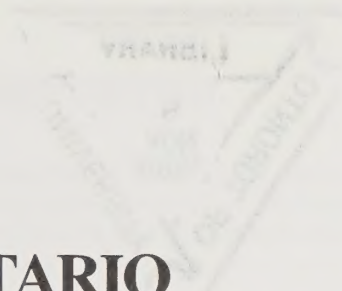
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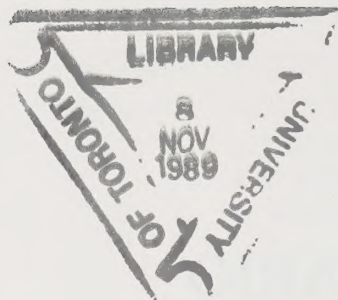
**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1988] OLRB REP. OCTOBER

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

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1489-84-R; 1490-84-R; 1491-84-R; 1492-84-R; 1549-84-R Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. McDonnell-Ronald Limousine Service Limited, operating as **Airline Limousine**, Respondent; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Aéroport Limousine Services Ltd. and McIntosh Limousine Services Ltd., Respondents; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Airlift Limousine Service Limited, Respondent; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Air Cab Limousine Services (1985) Ltd., Respondent v. Group of Employees, Objectors; Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Airlift Limousine Service Limited, Respondent

Certification - Practice and Procedure - Union seeking to withdraw certification applications filed in 1984 - Union intending to file new ones requesting a pre-hearing vote - Respondent requesting dismissal of applications with a 10 month bar - Board dismissing without bar - Section 103(2)(i) not a penal provision

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Rundle* and *J. Sarra*.

DECISION OF THE BOARD; October 14, 1988

1. These are a series of certification applications filed in the fall of 1984. In each one, the union seeks to represent the drivers of the airline limousines that carry passengers to and from Toronto International airport.
2. These cases have already given rise to lengthy Board proceedings and two Board decisions dated January 18, 1985, and March 9, 1988. The issues canvassed in those decisions need not be repeated here. It suffices to say that the companies raised a number of objections to the way in which the applications were framed and the right of their drivers/owner-operators to organize and bargain collectively under the *Labour Relations Act*. For the most part, after many days of hearing, those positions were rejected by the Board.
3. By letters dated August 31, 1988 and September 12, 1988 the union seeks to withdraw these certification applications. Its expressed intent is to file new ones pursuant to section 9 of the Act, so that the present complement of drivers/owner-operators can signify, by secret ballot, whether or not they wish to be represented by the union in their relationship with the companies. The Board circulated those letters to counsel for the respondents for his comments. His written submissions were received on October 11, 1988.
4. The respondents take the position that these certification applications should all be dismissed, and, further, that, pursuant to section 103(2)(i) of the Act, the employees and the trade union should be prohibited from making any new application for a period of 10 months. The employers cite, *inter alia*: the length of these proceedings, their complexity, the fact that the union

may have gained some knowledge about the identity of the employees from the proceedings to date, the interest expressed in these matters by the media and others, what appears to be a renewed effort by the union to revive or establish its support among the existing pool of drivers/owner-operators, and the presence of certain outstanding unfair labour practice complaints filed in connection with the union's latest effort to solicit support, and, involving what, in its submission, is illegal employer interference.

5. We have carefully considered the employers' submissions but accept them only in part. We agree that the current applications should be dismissed. We do not agree that we should go further than that, or impose any bar on a new application by the union and its supporters.

6. Section 103(2)(i) is not a penal provision, and certainly should not be applied in circumstances where the applicant trade union's legal position (however long it took to establish) was ultimately vindicated. We acknowledge the employers' concerns about the uncertainty surrounding their employer-employee relations, and the other matters raised in counsel's written representation; however, those concerns are matched, in equal measure, by the concerns of the union and its supporters who want only an authoritative determination as to whether a majority of the drivers/owner-operators want to engage in collective bargaining - a right guaranteed to them by section 3 of the Act and confirmed by the Board's decision in March 1988. On balance therefore, we are persuaded that no bar should be imposed. Any pre-hearing vote applications which the union may wish to file will be processed in accordance with the Board's usual practice. Similarly, unfair labour practice allegations will be dealt with in accordance with the Board's established procedure under section 89 of the Act and the Rules.

7. Having regard to the foregoing, these applications for certification are all dismissed, but without the imposition of a bar to such further application(s) as the union may wish to make.

1163-88-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC, Applicant/Complainant v. Allan Candy Ltd., Respondent

Practice and Procedure - Pre-Hearing Vote - Unfair Labour Practice - Union writing to Board on day of vote alleging that employer's captive audience meeting a violation of the Act - Box sealed - Union later filing an unfair labour practice complaint - Board inferring from filings that the union wanted a hearing on whether the ballots should be counted - Board expressing concerns about failure to expressly request a hearing in such circumstances - Matters listed for hearing

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

DECISION OF OWEN V. GRAY, VICE-CHAIR, AND BOARD MEMBER W. GIBSON; October 27, 1988

1. This is an application for certification in which the applicant requested that a pre-hearing vote be conducted. By decision dated September 14, 1988, a somewhat differently constituted panel directed that a pre-hearing representation vote be taken. The matter of arrangements for the conduct of the vote was referred to the Registrar.

2. On the day the vote was conducted, September 29, 1988, counsel acting for the applicant trade union wrote to the Registrar to the following effect:

We have just learned that a captive audience meeting involving all employees was held at the workplace yesterday. Mr. Freeman, owner and proprietor, and Mr. Rossi, general manager, were present. They read a letter to the employees (a copy of which is appended), which contained threats to their job security. Further particulars will follow. It is the position of the applicant that this constitutes a violation of the Act.

It is the further position of the applicant that the ballot box ought to be sealed pending the Board's resolution of this complaint.

The Registrar did seal the ballot box, in the exercise of her delegated authority to determine matters involving the conduct of the vote. Obviously, this did not involve a determination by her or by the Board of the merits of the implied claim that ballots cast in the vote conducted that day would not reflect the true wishes of the voters. It simply ensured that the Board could deal with the question whether effect should be given to the ballots cast in the vote before those ballots were counted.

3. Notice of the Report of the Returning Officer with respect to this vote was given to the applicant, respondent and affected employees in Form 71. By means of that form, those parties were advised that if they wished to make representations in connection with the application or as to any matter relating to the representation vote, they were required to send a statement to that effect to the Board by October 12, 1988, which statement was required to contain "a concise statement of your allegations concerning the application or the representation vote" and "a statement as to whether you desire a hearing before the Board." The Notice further stated that if no such statement were filed by the specified date, the Board might dispose of the application upon the material before it without further notice. In this regard, the Notice advised the parties that "If you do not request a hearing but wish the Board to consider your representations without a hearing, your statement of desire must contain all the representations you desire the Board to consider." (While Form 72 should have been used to give notice of the report of the Reporting Officer, the relevant portions of Forms 71 and 72 are the same, and no interested party would have learned from a notice in Form 72 anything which they would not have learned from the notice given here.)

4. By letter to the Registrar dated October 4, 1988, the respondent's solicitors asserted that:

... the contents of the letter read to Allan Candy employees does not [sic] make out a prima facie case of any violation of the *Ontario Labour Relations Act*. We are unable to discern any threats to the job security of our client's employees as alleged in Union Counsel's letter.

Unless further particulars follow expeditiously in the form of a Section 89 complaint, it is our client's position that there is no basis upon which the integrity of the secret ballot vote can be questioned. Therefore, the ballots should be counted and the result should be binding upon the Respondent and the Applicant.

On October 6, 1988, the Board received written representations from some employees to the effect that the ballot box should be opened and the ballots cast should determine the result of the certification application.

5. In the afternoon of October 12, 1988, the Registrar received the following letter dated October 11, 1988, from counsel for the applicant:

RE: Retail, Wholesale and Department Store Union and Allan Candy Ltd.
1163-88-R and our Unfair Labour Practice Complaint

Further to our letter dated September 29, 1988; enclosed please find six copies of an unfair labour practice complaint, which we ask that you process in the usual way.

We have had a chance to review the letter from the respondent, dated October 4, 1988 requesting further particulars.

Our allegation is that the attached letter, read by the respondent to all employees the day before the vote, is in violation of the Act. The respondent's position, as we understand it, is that we have not made out a prima facie case. They request further particulars.

In our opinion, whether we have made out a prima facie case is a matter for argument, not for further particulars.

We reiterate our request that the ballot box remain sealed pending the Board's determination of our complaint.

The unfair labour practice complaint referred to in this letter has been assigned Board File No. 1679-88-U. The acts complained of are described this way in that complaint:

A representation vote was scheduled to be held on September 29, 1988. The day prior to the vote, a "captive audience" meeting was held by the owner and general manager of the respondent. The attached letter was read to the employees.

It is the union's position that the letter contains threats to the job security of the employees, and that the respondent's activities were in violation of sections 64, 66 (a) and (c) and 70 of the Act.

The relief claimed in the complaint includes certification pursuant to section 8 of the Act or, alternatively, a new vote (which claims, we note, should more correctly have been asserted in the certification proceedings themselves).

6. Subsections (2), (4) and (5) of section 70 of the Board's Rules of Procedure provide as follows:

(2) Subject to subsection (3), *where a pre-hearing representation vote is taken,*

(a) *a party; or*

(b) *any employee or representative of a group of employees,*

who desires to make representations in connection with the application or as to any matter relating to the representation vote or the accuracy of the report of the returning officer or the conclusions the Board should reach in view of the report, shall file a statement of desire as prescribed in Form 71 or 72, as the case may be, on or before the last day for the posting of copies of the report and notices under subsection 69(3).

(4) *Upon receiving a statement of desire to make representations in the form and manner required by this section that contains a statement that a party or any employee or representative of a group of employees desires a hearing before the Board, the registrar shall serve a notice of hearing in Form 8 upon each of the parties to the proceedings and upon each person who has filed a statement.*

(5) *Where no statement of desire to make representations has been filed in the form and manner required by this section, or no such statement that has been filed states that a party, employee or representative of a group of employees desires a hearing before the Board, the Board may dispose*

of the application upon the material then before it without further notice to any party or to the employees.

[emphasis added]

7. This application was referred to this panel at this stage because no *express* statement that a party desires a hearing in the certification proceedings appears in any of the statements of desire filed. (For the sake of analysis, we include in that category all of the applicant's material referred to herein, including the complaint filed under section 89.) We were initially inclined to the view that subsection 70(5) of the Rules was therefore applicable. As appears from the use of the word "may" in subsection 70(5) of the Rules, the Board is not obliged to deal with an application upon the material then before it without a hearing. The Board may conclude from the material then before it that a hearing is necessary or desirable. We therefore considered whether we would dispose of the question whether to count the ballots without conducting a hearing. That required consideration of the merits of the applicant's claim having regard to the representations it had made.

8. We read the letter which the applicant says was read to employees by the owner and general manager of the respondent at a "captive audience" meeting held on the day before the vote was conducted. In the absence of any other representation as to its meaning, we took the phrase "captive audience meeting" to mean that the meeting was instigated and called by the employer and conducted during the employees' working hours, and that all employees were required to attend. Having carefully reviewed the letter which was attached to counsel's letter of September 29, 1988 (no copy of any letter was, in fact, attached to the unfair labour practice complaint which accompanied the letter of October 11, 1988), we did not find in it any threat to the employees' job security. In the absence of any representation that any of the language used by the employer had some special or secondary meaning in the context of the subject workplace, it appeared from the material before us that the respondent had remained within the bounds of the "freedom of expression" exception in section 64 of the Act. We concluded that we would direct that the ballot box be unsealed and that all ballots be counted, with the exception of segregated ballots of persons about whose eligibility to vote there was no agreement by the applicant, respondent and any interested employee in attendance at the time the ballots are counted.

9. Before our decision to that effect was released, we became aware that, as a matter of practice, some panels of the Board take the approach that a statement that a party desires a hearing need not be express but may be *implied* in what a party has written. While it is not at all difficult for a party who receives and reads a Notice in Form 71 or 72 to respond to its instructions by writing the words "We desire a hearing", the word "express" does not appear beside "statement" in the phrase "statement as to whether you desire a hearing before the Board" in Forms 71 and 72 or in the phrase "statement that a party ... desires a hearing before the Board" in subsections 4 and 5 of section 70 of the Rules. Although it was not initially our interpretation, the view that the requisite statement may be implied seemed a not unreasonable interpretation of the language of section 70 of the Rules.

10. Another matter of practice then entered into our consideration. The numbered paragraphs of Forms 71 and 72 clearly say that a party wishing to make representations in connection with the application or as to any matter relating to the representation vote must set out in its statement of desire at least a concise statement (Form 71) or summary (Form 72) of the representations it wishes to make, even if it also states that it desires a hearing. In practice, parties familiar with Board proceedings often do little more than say that they desire a hearing with respect to matters still in issue, without setting out any statement or summary of the representations of fact on which they propose to rely. This is apparently on the theory that the last words on those Forms (which

appear in the last of the quotations in paragraph 3 of this decision) suggest that it is only necessary to set out representations when a hearing is not asked for. In practice, parties have not been limited at hearing to the representations summarized in their statements of desire; that practice has no doubt encouraged the view that, despite the language of the Notices, the representations to be made need not be summarized or concisely set out in a statement of desire if a hearing is requested (except to the extent necessary to comply with section 72 of the Rules). Against that background, if the applicant here *has* made a statement that it desires a hearing, it might fairly think that, for the purposes of Rule 70, its statement of desire need only allege threats to job security without making any representations of fact to support the allegation.

11. It seems not unlikely that this applicant wants a hearing. Such an implication can be drawn from the filing of the complaint and the request that it be processed, on the theory that those who file complaints clearly want the subject matter of those complaints to be the subject of a hearing. A decision that it is not entitled to a hearing as of right because it has not expressly said “we desire a hearing” might come as a surprise to it. It would be unfortunate if Rule 70 were administered inconsistently, with some panels taking the view that parties wishing a hearing as of right must say so expressly, while others are prepared to review the filings to see if any party has said anything from which a desire for a hearing may be inferred. In the interest of consistency and fairness, we accept the latter approach.

12. Although the applicant has not said “we desire a hearing”, we infer from what it *has* said that it wants a hearing on the question whether the ballots should be counted and, in that sense, has made a statement that it desires a hearing. We therefore have no choice but to direct that the Registrar list the certification application for hearing pursuant to subsection 70(4) of the Rules. It would make sense to list Board File 1679-88-U with it.

13. Out of respect for the concern expressed by our colleague in his concurring decision, we should explain why we have recorded in paragraph 8 the finding that we made after we initially concluded that we could deal with the issue raised by the applicant on the material before us, without conducting a hearing.

14. Those who appear before the Board, including trade unions and those who represent them, are often heard to express frustration and disappointment that the Board does not more often deal summarily with claims which, because of the way they have been expressed, do not appear to allege a *prima facie* case for the relief sought. Against that background, and having regard particularly to our own initial reaction, we thought that in the absence of an explanation, the employer and the employees who have requested that the ballots be counted might well be perplexed that the disposition of this certification application is being delayed by scheduling for hearing a claim which appears on its face to have no merit, particularly when the party asserting the claim has not expressly asked for a hearing. We thought it important to provide an explanation of that result. We thought it important to make it clear that the critical question was whether we were free to dispose of the matter on the material before us: that it was critical because, on the material before us, we would have summarily rejected the assertion that the ballots should not be counted, if we were free to do so. It was important to record that the result here was strongly influenced, if not dictated, by practices the existence of which might not be intuitively obvious to someone who has merely read the Board’s Forms and Rules of Procedure. So far as we are able to do so by referring to them here, it was important to ensure that all those who may become involved in Board proceedings can become aware in advance of practices which influence the way panels may deal with procedural problems. It is necessary not only that the Board’s approach to procedural issues be even-handed but also that it appear to be even-handed. It is necessary, therefore, to record and to demonstrate to the other parties to this application that the Board’s Rules, inclinations and past

practices produced the result here, and should do so equally for them if positions were reversed. It was desirable to demonstrate that the Board is disciplined by those rules and considerations *despite* any impression it may prematurely form with respect to the merits of a claim. It was also desirable to alert parties who become involved in Board proceedings that the failure to *expressly* request a hearing in circumstances such as these can lead to a panel's forming (and perhaps even acting on) what to the party would seem a premature view of the merits of its position. For all of these reasons, we felt it was necessary to record our initial reaction to the material before us.

15. It necessarily follows from our ultimate conclusion, and we agree with our colleague, that it will be for the panel which hears this matter to determine, on the basis of whatever evidence may then be offered and received, whether the ballots cast on September 29, 1988 should be counted. As we came to a premature determination of that question, it should not be heard by this panel. The panel which does hear the matter will not, of course, be bound by the conclusion we have expressed in paragraph 8.

CONCURRING OPINION OF BOARD MEMBER C. A. BALLENTINE; October 27, 1988

I concur with this decision except paragraph 8 page 5. I view this finding as unnecessary and it should have been left for the panel of the Board that will hear the complaint to decide.

3277-87-OH Philip A. Heath, Complainant v. Butler Metal Products, Respondent

Health and Safety - Employer deciding to alter protective gates surrounding robotic cells - Supervisor arguing that work would be unsafe unless production were stopped - Supervisor leaving plant because he did not want to be responsible for the performance of work he felt was unsafe - Supervisor not permitted to return later to work - Board finding that supervisor did not intend to quit - Work found to be safe but decision to not allow supervisor to return to work motivated by supervisor's efforts to enforce the OHSA - Compensation awarded

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. N. Fraser* and *P. V. Grasso*.

APPEARANCES: *Philip A. Heath* for the complainant; *John P. Sanderson* and *Malcolm McKillop* for the respondent.

DECISION OF THE BOARD; October 14, 1988

1. Philip Heath, the complainant, alleges that he has been dealt with by the respondent contrary to section 24(1) of the *Occupational Health and Safety Act* (hereinafter referred to as "the Act" and "the OHSA"). Heath, who was employed by Butler Metal Products ("Butler") as a supervisor, is seeking compensation for the period January 29, 1988 to May 2, 1988. Since Heath was able to obtain employment with another firm, he did not request an order from the Board directing Butler to reinstate him.

2. Butler called M. Renner, E. Frey, D. Shrubsall, J. Dienes and R. Pederson to give evidence. Heath testified in support of the complaint. In making its finding of fact, the Board considered all of the oral and documentary evidence.

3. Butler is a manufacturing company that essentially serves the automobile industry. As a part of its manufacturing process, Butler utilizes robots. The size of its plant in Cambridge is approximately 300,000 sq. ft. and it employs approximately 800 persons. Local 1986 of the CAW represents the production employees.

4. After leaving a supervisory position at another company, Heath started to work for Butler in 1985 as a press operator. After three weeks, he was promoted to a supervisory position. Since 1985, Heath's supervisory responsibilities increased and he was deployed by the company on different shifts. In September 1986, Heath was given the position of Robotics Supervisor and in January 1987 he was promoted to the position of Robotics Supervisor-Coordinator. During 1987, Heath attended two robotic training courses which focused on a number of matters, including safety. In mid-1987, Heath assumed the responsibilities of P. McGeoch, the Robotics Superintendent, in McGeoch's absence. These responsibilities included the supervision and training of other supervisors. The evidence discloses that, except for the incident referred to below, Butler management considered Heath to be a model supervisor. Heath was particularly conscious of safety issues. This was consistent with Butler policy which recognized that safety came first, quality second and production third.

5. On January 29, 1988, Heath left Butler's premises shortly after his shift started because Butler authorized the performance of certain work in his department which he felt created an unsafe situation. In order to appreciate what occurred on that day, one must review the events of the week ending January 29 and the events of the following week.

6. On January 11 1988, Heath returned to the plant after a Christmas vacation. McGeoch advised Heath on that day that production was still behind in the robotic areas and that, while Heath was absent on vacation, a Ministry of Labour inspector issued an order concerning maintenance personnel performing maintenance work in the robotic cells while production was ongoing. The order McGeoch referred to in this discussion was placed before us. Among other things, the order directs Butler to repair a gate in the G.M.10 area. During their discussion, McGeoch did not make any reference to the repair of gates.

7. During the relevant period, Heath was the supervisor for department 91 which is also referred to as the front body area. Department 89, the G.M.10 area and department 90, the rad yoke area, are supervised by D. Shrubsall. Each of these departments contain robots and each of the robots are enclosed by a four foot high fence with a gate. These enclosures, which are commonly referred to as cells, are not identical but have many common features. Common to all the robotic cells is the Butler safety procedure for lockouts. The robot control panel is located outside the cell and contains a control key. The gate into the cell can be locked when closed and is unlocked by using the control key. The lockout procedure requires a person to remove the control key from the control panel, which shuts down the operation of the robot, and to use the control key to open the gate to the cell. The lockout procedure is designed to ensure that persons, such as maintenance personnel, do not enter the cell to perform work while the robot is operating and to ensure that persons do not inadvertently enter the cell. It was the failure to follow the lockout procedure, among other things, which caused the inspector to issue the order referred to above in early January 1988.

8. Beginning at 4:00 p.m. on January 25, 1988, Butler held a meeting with its supervisors in order to explain the responsibilities of employees, the company and supervisors under the OHSA. E. Frey, Manager of Safety and Employee Development, advised the supervisors in particular about their responsibilities under the Act. Section 16 of the OHSA is the provision which sets out the duties of a supervisor.

9. As a result of the inspector's order, Butler decided to alter some gates on some of the robotic cells. These gates were attached to the fence and forklifts striking the fence posts could cause an alignment problem preventing the gates from closing properly. Butler decided to attach the gates to posts which were not connected to the fence. The gate would be attached to the new posts located just inside the fence. Butler engaged the services of a contractor to perform the work. The job of putting in the new posts just inside the existing fence and hanging the gate would require the contractor's employees to work a few feet inside the cell. The supervisors in the affected departments were not advised in advance that certain gates in their areas were to be altered.

10. During the early morning of January 26, 1988, Heath was advised by R. Carney, an industrial engineer, that Butler intended to have a contractor perform some work on a gate in his department without stopping production. Heath advised Carney that this would be unsafe and contrary to an order of an inspector from the Ministry of Labour. A considerable amount of discussion took place that morning between Heath and other management representatives concerning the way in which Butler intended to have the contractor perform the work on the gates. M. Renner, the Industrial Engineering Supervisor and the person who had the overall responsibility for overseeing the job, and E. Frey were involved in these discussions. When the discussions had concluded, Heath and his superiors had reached an impasse. Heath was convinced that the plan to work on the gates while production was running was unsafe. The management representatives were equally convinced that performing the work on the gates while the robot was operating was safe.

11. Renner, with Frey's assistance, attempted to convince Heath that the work could be performed while the robot was operating. When Heath was not initially convinced, Renner and Frey went to the department to demonstrate what was intended. They explained to Heath that a temporary barricade would be installed while the work on the gates was performed. The barricade would be located a few feet within the gate and consist of a chain with a padlock as well as a 4' X 4' cardboard sign on the chain. The key to open the padlock would be fixed to the control key. In the opinion of Renner and Frey, the temporary barricade achieved the same objective as the original gate since both prevented someone from inadvertently walking into the cell while the robot was operating. Heath was not convinced and in his evidence, he indicated that he had a number of concerns. One concern was the amount of lift truck traffic around the cell in question and another was the sparks created by the spot welding. We are not satisfied, however, that these two concerns were clearly communicated to Renner and Frey. The concern which was the primary motivation for his conduct was the fact that Heath felt that the temporary barricade was not an adequate means of protecting the integrity of the lockout procedure. Heath asked Frey if Frey would assume responsibility for the area if he felt the work could be performed so safely. Frey indicated that he would not assume that responsibility and advised Heath that while on the premises Heath was responsible for his area. Heath then restated his position that since the work was not going to be performed in a safe manner, he would not permit the work to be done in his area.

12. Renner felt somewhat frustrated by this turn of events. The discussion took approximately thirty minutes, no work was performed and he and Frey were unable to convince Heath that the work should proceed. Renner and Frey decided to leave Heath's department and went to department 89 which was supervised by D. Shrubsall. The work to be performed with the gates in department 89 was similar to the work required on the gates in the other departments. However, the robots in department 89 were smaller and further away from the gate when compared to those in department 91. Renner explained to Shrubsall the work that was to be performed as well as Heath's objection. When the discussion with Shrubsall occurred, D. Gordier, an employee member of the joint health and safety committee, was present. Renner explained and demonstrated the

temporary barricade. After discussing the situation with the employees in the department, Shrubsall indicated that the work could go ahead. Shrubsall testified that, in her view, the work could be done safely and she was satisfied that the temporary barricade did not compromise the lockout procedure since it achieved the same result. The contractor's employees proceeded to work on the gates in department 89. Gordier did not object to the work proceeding after the discussion with Renner and Frey, nor did he object subsequently after he had the opportunity to observe the work being performed.

13. On January 26, 1988, Heath had a brief discussion with Shrubsall in which he indicated to her that they should stick together and support each other. The work on the gates in department 89 continued to be performed on January 27. Renner and Heath talked briefly on that day. Renner indicated that the gates would have to be installed in Heath's department. Heath responded "fine, as long as it is done safely". Heath also talked to McGeoch on January 27. McGeoch told him that he, McGeoch, had a "big war" with Renner over Heath's conduct and that he should be sure of what he was doing. Heath responded that he was sure of what he was doing and that safety came first.

14. On January 27, the work on the gates was completed in department 89. On January 28, the contractor's employees were again in department 91 and Renner asked Heath if the work could proceed. Heath said that it could not proceed if production was to run. The contractor's employees then went to department 90, another department supervised by Shrubsall. Since the robot was larger and closer to the gate in department 90, Shrubsall approached Renner with some safety concerns. Renner explained the programmed working envelope of the robot, the electronic self-check feature and the 8' foot high post which acts as a barrier in order to convince Shrubsall that the work could be performed safely. After Renner's explanation and after again discussing the matter with employees under her supervision, Shrubsall was satisfied that the work could proceed safely. At this point, the employees of the contractor had some safety concerns. These employees were given the same explanation from Renner that Shrubsall received. There was some discussion about having an inspector come to the site, but after the explanation, the contractor's employees were satisfied that the work was safe. The work started and was completed in department 90 on January 28.

15. On January 29, the contractor's employees were instructed to report to department 91. Renner went to the cell and asked Heath if they could go ahead and work on the gate. Heath said no since it was unsafe unless production was shut down. Renner advised McGeoch of the situation and in his evidence noted he was a little frustrated with what was going on. After advising McGeoch of the situation, Renner's involvement in this matter ended. Frey did not participate in the events of January 29. The only direct evidence we have concerning the material events of January 29 is Heath's evidence.

16. At approximately 9:10 a.m. on January 29, McGeoch asked Heath where the contractors were and when Heath advised him of their location, McGeoch told Heath that the gates had to be done. When Heath told McGeoch that production should be shut down, McGeoch gave him some money to purchase coffees and told Heath that he would meet him in department 91. When Heath arrived at the department, it was evident that the contractor's employees were preparing to work on the gate. Heath asked McGeoch what he was doing and McGeoch responded by saying that the gates had to be done. Heath again advised McGeoch that it was not safe to perform the work while production was running. McGeoch then tried to put his arm around Heath's shoulders and told Heath to go for a walk. Heath testified that at that point he knew he had to make a difficult decision since Butler intended to work on the gates while production continued and wanted him to turn a blind eye to the situation. Heath walked over to a supervisor who he was training and

asked him to look after department 91. He then went to the supervisor's office where he met Don Reid, another supervisor. Heath told Reid that he was going home since there was "a lot of bullshit going on down there" and he was not going to be held responsible. When Reid said Heath would be back Monday, Heath said he would if there was "no more bullshit". Since Reid had said he was leaving the company earlier in the week, Heath shook his hand, said goodbye and then left the plant and went home. Butler was about to perform work in his area which he felt was unsafe and at the same time Butler was telling him that he was responsible as long as he was on the premises. In his evidence, Heath indicated that he felt he had no other choice in the circumstance but to leave the plant. Shortly after Heath left the plant, the work on the gates in department 91 was stopped. This work continued on January 30 when production was not running.

17. After arriving at his home, Heath called the Ministry of Labour and advised them of the situation. He then called his wife before leaving the house. When he returned home, he was advised that G. Ducharme, Production Manager, had phoned and left a message to the effect that Heath call him on Monday morning. That evening Heath called D. Reid to ensure that the overtime work on the weekend was covered and was advised by Reid that it was.

18. On Monday, February 1, Heath got dressed for work, took his daughter to the babysitter, came home and phoned Ducharme. The only evidence we have of this conversation is Heath's. By the time of the hearing, Ducharme had left the employ of Butler and did not testify. Heath asked Ducharme if everything in his area was okay and whether it was safe for him to return. Ducharme said no to Heath's returning and advised Heath that he expected his resignation in writing. Heath told Ducharme that he was not resigning and explained to him why he left the plant the previous Friday. In particular, he told Ducharme that Frey had advised him that he was responsible as long as he remained on the premises. Ducharme insisted on obtaining Heath's resignation and advised Heath that he was guilty of gross misconduct unbecoming of a supervisor. The conversation ended by Heath advising Ducharme that he, Heath, would talk to somebody who would hopefully look at the situation more rationally.

19. R. Pederson is Butler's Director of Human Resources and Purchasing. After speaking with Ducharme, Heath called Pederson and asked him if he could intervene on his behalf. Pederson was unaware of the events of Friday, January 29 and the telephone conversation between Heath and Pederson was brief. Pederson's recollection of the conversation was that Heath wanted his assistance in getting his separation papers as soon as possible. Pederson testified that he told Heath he would pass the matter on to J. Dienesch, the manager of employee relations. Pederson indicated that after talking to Dienesch his involvement in the matter ended. Heath's recollection of the conversation, which we prefer, is that he told Pederson why he left the plant on Friday, he told him about his conversation with Ducharme and he said that if he was being released he would like to obtain his release papers quickly. Heath testified that the conversation ended after Pederson told him he would get Dienesch to do a complete investigation.

20. Dienesch testified concerning the investigation he conducted. It was not Dienesch's role to determine Heath's employment fate and we do not propose to set out the details of his investigation. Suffice it to say that he talked to McGeoch and Reid and then spoke to the complainant during the early afternoon of February 1. Heath explained to Dienesch why he left the plant on Friday. He told Dienesch that he had no alternative but to leave the plant since he would be held accountable for safety with respect to work which he felt was unsafe. Heath asked that his separation papers be prepared quickly and a meeting was arranged for Wednesday afternoon. Dienesch testified that it appeared to him that Heath was severing the employment relationship. On Tuesday, Dienesch spoke with McGeoch, Frey and Renner. At their Wednesday meeting, Dienesch had a brief discussion with Heath before giving him his separation papers. Among other things, Heath

advised Dienesh that he was not required to work overtime on the previous Saturday as Dienesh alleged. When Heath observed that his separation papers indicated he had quit, he advised Dienesh that he had not quit and that he would get the Ministry of Labour involved. Since January 29, Heath has had a number of discussions with an inspector from the Ministry of Labour.

21. In essence, Heath argued that Butler contravened section 24 of the OHSA in not permitting him to return to work subsequent to January 29. Section 24 prohibits certain employer conduct because the worker has acted in compliance with the Act or the Regulations or has sought the enforcement of the Act or the Regulations. With respect to whether or not he acted in compliance with the Act or the Regulations, Heath relied on section 79 of the Regulations. Counsel for Butler argued that whether Heath quit or was terminated by Butler, there is no evidence to support the conclusion that Butler acted in the way it did towards Heath because of any of the prohibited grounds set out in section 24(1).

22. The relevant parts of section 24 of the Act and section 79 of the Regulation read as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

79. A part of a machine, transmission machinery, device or thing shall be cleaned, oiled, adjusted, repaired or have maintenance work performed on it only when,

- (a) motion that may endanger a worker has stopped; and
- (b) any part that has been stopped and that may subsequently move and endanger a worker has been blocked to prevent its movement.

23. In *Ministry of Community and Social Services*, [1988] OLRB Rep. Jan. 50 at paragraphs 18 and 19, the Board made the following comments concerning the nature of the prohibitions contained in subsection 24(1) of the OHSA:

18. Section 24(1) of the Act prohibits an employer or a person acting on behalf of an employer from responding in the ways detailed in (a) to (d) because a worker has acted in compliance with the Act or the regulations. When determining whether a worker has acted in compliance with the Act or with the regulations, it is not sufficient that a worker believes in good faith or reasonably believes he is complying with the Act or the regulations. The Board must be satisfied that a worker has, in fact, complied with the Act or the regulations and that such compliance prompted a prohibited response. Whether a worker has complied with the Act or the regulations depends on an interpretation of the relevant provisions relied upon and the facts in each case. It is not uncommon for complaints under section 24 to allege that an improper employer response occurred as a result of a worker's compliance with section 23 of the Act. In determin-

ing whether there has been a refusal within the meaning of section 23, it is necessary to determine the worker's belief at the first stage of the refusal and the reasonableness of the belief if the worker continues to refuse after an investigation has been conducted. It is not section 24 of the Act which makes such an inquiry necessary but rather the precise requirements contained within section 23 of the Act.

19. Section 24 prohibits an employer or a person acting on behalf of an employer from responding in the ways detailed in "a" to "d" because the worker has sought the enforcement of the Act or the regulations. A worker may seek such enforcement by communicating with the employer, by contacting an inspector, by making a complaint under the Act, or by a number of other means. If the worker is seeking enforcement of the Act an employer cannot legally discipline, etc. the worker, even if the concern of the worker is not found ultimately to be a contravention of the Act. Conduct which seeks enforcement of the Act is protected activity in order to encourage workers to raise health and safety concerns with their employer and others and to thereby reduce the likelihood of injury in the workplace (see, *Commonwealth Construction Company*, [1987] OLRB Rep. July 961).

24. The focus of the Board's inquiry in complaints such as the one before us is addressed in *Commonwealth Construction Company*, [1987] OLRB Rep. July 961 at paragraph 21:

21. The issue we must decide is why the complainants were discharged. This turns on our finding of the facts, based on our assessment of the evidence and whether we believe the company's claim that it discharged them because they wouldn't perform their work, or the complainants' claim that they *were* performing their work and never took company time for their pursuits, and were discharged because they raised safety matters. Put in terms of the statutory language, were the complainants discharged *because* they acted in compliance with the Act or *because* they sought its enforcement? It is important to understand that what is protected by the Act is the right of employees not to be threatened or disciplined *because* of their acting in compliance with the Act (or regulations etc.) or seeking its enforcement. An employee might engage in conduct warranting discipline, and in those circumstances an employer can impose discipline, provided the discipline is not motivated even in part by a concern that the employee was acting in compliance with or seeking to enforce the Act. Discipline levied for that reason is proscribed by section 24(1). Whether a breach is found will depend on whether the Board concludes that the disciplinary response was even partially prompted because the employee was seeking to exercise his or her rights under the Act. In this respect, the Board's inquiry under section 24 of this Act parallels the nature of the inquiry under section 89 of the *Labour Relations Act*. As the Board noted in *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577:

44. We now turn to the unfair labour practice provisions underlying this complaint and to a consideration of the law as it relates to the degree of anti union motive necessary to establish such violations of the Act. For the purpose of our analysis it is useful to distinguish between decisions affecting individual employees and major business decisions having potentially broader impact. In dealing with the treatment of individual employees this Board has consistently held that if only one of the reasons for an employer's actions against an employee (discharge, layoff, transfer, demotion, etc.) is related to union activity the action is in contravention of the Act. Given the reverse legal onus mandated by section 79(4a) the Board has held that to find there has been no violation of the Act in these kinds of cases it must be satisfied that the employer's actions were not in any way motivated by anti-union sentiment. The Board summarized this approach and the effect of the statutory reversal of the legal burden of proof in *The Barrie Examiner* case, [1975] OLRB Rep. Oct. 745 as follows:

... the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct.

This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given

for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the act has occurred.

(See also *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 294 and *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299). Judicial support for this application of the law is found in *Regina v. Bushnell Communications et al* (1973), 1 O.R. (2d) 422 wherein the Ontario High Court overturned a lower court decision which had dismissed a complaint under section 110(3) of the *Canada Labour Code*, which is identical in all material respects to section 58 of the *Labour Relations Act*, on the grounds that membership in a union was not established as the 'principal reason' for the termination of employment. The High Court held:

In considering an enactment devoid of the words 'sole reason' or 'for the reason only' applied to the act of dismissal and resting only on the word 'because', the Court must take an expanded view of its application. If the evidence satisfies it beyond a reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority, s. 110(3) of the *Canada Labour Code* has been transgressed.

The decision of the High Court was upheld on appeal by the Court of Appeal (4 O.R. (2d) 288) and was cited with approval by the Federal Court in *Sheehan and Upper Lakes Shipping Limited et al* (1977), 81 D.L.R. (3d) 208. In this jurisdiction, therefore, the Board, with judicial support, applies a 'taint theory' in dealing with alleged unlawful treatment of individual employees. If an employer's actions impact against individual employees and the motives underlying the employer's actions are in any way tainted by an anti-union animus the employer is in violation of the Act.

The same sorts of considerations and analysis apply in our view to alleged violations of Section 24 of the *Occupational Health and Safety Act*. If the respondent has convinced us that no part of the reason for the discharges was concern over the complainants' seeking enforcement of the Act or acting in compliance with it, then the respondent will not have violated section 24 of the Act.

25. We have examined the evidence and submissions before us in the context of the Act's provisions and the principles enunciated in the cases referred to above. The central questions that must be addressed are whether Butler has satisfied us on a balance of probabilities that its treatment of Heath was not based in whole or in part on his acting in compliance with the Act or the Regulations or because he sought the enforcement of the Act or the Regulations.

26. A finding that Heath voluntarily quit his employment with Butler would necessarily lead the Board to conclude that Butler did not contravene section 24 of the Act. However, the facts do not support the conclusion that Heath quit. The right to quit one's employment is a right which is peculiar to the employee and in order to determine whether Heath quit his employment, the Board must, in effect, decide whether he voluntarily intended to sever his employment relationship with Butler. In determining this issue, we are cognizant of the jurisprudence which recognizes that the act of quitting consists of both a subjective intention to leave one's employer as well as some objective conduct consistent with that intention (see *Anchor Cap & Closure Corp. of Canada Ltd.*, (1949), 1 L.A.C. 222 (Finkelman)). Heath's leaving the plant during the early part of his shift on January 29 may be some objective evidence of quitting. However, the evidence discloses that Heath did not intend to quit Butler. Heath left the plant on January 29 since he did not want to be responsible for the performance of certain work which he felt was unsafe. Frey had told him that as long as he was on Butler's premises he was responsible for his area. Heath felt he had no option but to leave the plant while the work which he considered to be unsafe was being performed in his

department. On Monday, Heath was prepared to return to work. He specifically told Ducharme on Monday and subsequently told Dienesh that he was not quitting. Upon reviewing all of the circumstances, the Board finds that Heath did not quit his employment with Butler on January 29. Although he left the premises on that day, he intended to return to work and the Board can only infer from a review of all of the evidence that it was Butler who determined that his employment with the company would not continue.

27. Having determined that Heath did not in fact quit his employment, we must still ask whether Butler's treatment of Heath was based solely on its view that he quit. Heath specifically advised at least two of his superiors subsequent to January 29 about the reason for his leaving the plant on January 29 and indicated to them as well that he was not quitting. The evidence Butler primarily relied on to establish that Heath quit was the evidence of Dienesh. Dienesh merely conducted an investigation of the incident and the evidence does not establish that he was the Butler official who determined that Heath quit. Dienesh formed his views based on discussions with some of the key participants in the incident but the direct evidence of these individuals is not before us. There is no indication in Dienesh's evidence that he spoke with Ducharme about the matter. In these circumstances, we are not prepared to conclude that Butler treated Heath in the manner it did solely on the basis that it formed the view that he quit his employment.

28. Heath did not argue that he had complied with section 23 of the Act, nor did he argue that he was complying with an inspector's order. As noted earlier, Heath alleges that Butler treated him the way it did because he complied with section 79 of the Regulations. In order for Heath to succeed on this aspect of his case, the Board must be satisfied that he complied with the Act and that Butler responded in the ways detailed in (a) to (d) of subsection 24(1) of the Act because of his compliance. Section 79 of the Regulation prohibits, among other things, the repair or maintenance of machinery when any motion that may endanger a worker has not been stopped. The repair work in this instance was not performed on the robots but on the gates to the fence enclosing the robot. In any event, when reviewing all of the evidence and the position of Heath and the Butler officials, we are satisfied that it is more probable to conclude that the work Butler performed concerning the gates while production was running was safe. In arguing that we should reach this conclusion, counsel for Butler emphasized that no one, including the contractor's employees, refused to perform the work. He also noted that after raising some concerns about the safety of the work, all of the participants ultimately concluded that the work was safe, except Heath. Although this is so, the subjective views of some participants to an event cannot be given much weight when one is attempting to determine safety issues from an objective perspective. However, the nature of the temporary barricade, the safety features of the robot and the cell, as well as the other circumstances, lead us to conclude that Heath was probably not right in concluding that the work in question was unsafe. Heath's view that no one could enter the gate while production was running, irrespective of the reason, was a very strict interpretation of the lockout procedure. The procedure was designed to prevent individuals from entering the cell to work on the robot or to inadvertently enter the cell while the robot was operating. On the basis of the evidence before us, we are satisfied that the work that was performed on the gates with the temporary barricade in essence satisfied the objective of the lockout procedure. Therefore, the Board is satisfied that Butler did not treat Heath the way it did because he complied with the Act or the Regulations since we are unable to conclude from the evidence and given Heath's submissions that he was acting in compliance with the Act or the Regulations.

29. We turn now to the question of whether Butler has satisfied the Board that its treatment of Heath was not based on the fact that Heath sought the enforcement of the Act or the Regulations. Although we have determined that Heath's actions were not in compliance with the Act or the Regulations, we are satisfied that his conduct during the week in question was motivated by

genuine safety concerns. In determining that the work on the gates while production was running was unsafe, Heath was acting in good faith. He raised his safety concern with his superiors and it was because of this concern that he refused to give his permission for the work to proceed. We note that in his discussion with Carney, Heath made reference to the inspector's order. In one sense, it is not surprising that his superiors were feeling somewhat frustrated when they were met with such resistance by someone on the management team. By refusing to give his permission to work on the gates, Heath's objective was the enforcement of the OHSA.

30. The Board does not condone the way in which Heath left the plant. He failed to inform or seek the permission of his superiors to leave. At the same time, the Board appreciates the difficult position Heath was in. But whether or not Heath was entitled to leave the plant on January 29 in the way he did, what we have to decide is whether Butler has satisfied us that the sole reason for its treatment of Heath was because of his leaving the plant, or whether its conduct was at least in part motivated by Heath's efforts to enforce the Act. As the Board noted in *Ministry of Community and Social Services, supra*, the Act provides that persons who attempt to seek enforcement of the Act are engaged in protected activity in order to encourage workers to raise health and safety concerns. Even if the workers' concerns are ultimately found not to be a contravention of the Act or the Regulations, as we have so found Heath's concerns, an employer is prohibited from responding in the ways detailed in (a) to (d) of subsection 24(1) of the Act because a worker sought enforcement of the Act or the Regulations.

31. The evidence of Renner, Frey, Pederson and Dienesch discloses that these Butler officials were not the ones who decided that Heath could not return to work. It appears from the evidence that Ducharme was the Butler officer who determined Heath's fate. Ducharme called Heath's home on January 29 and during their conversation on February 1, he asked Heath for his resignation. Pederson played a very minor role in the matter and Dienesch simply conducted an investigation of an incident that had occurred. From Heath's evidence, it is clear that Ducharme was concerned about Heath's leaving the plant on January 29. But on the evidence before us, the Board cannot be satisfied that the sole basis of his concern or Butler's concern was the fact that Heath left the plant. We can only conclude that Heath's leaving the plant on January 29 the way he did was of significant concern to Butler but without hearing from the individual responsible for deciding that Heath's employment would not continue, we are unable to conclude that it was the only reason behind Butler's decision. We have reached this conclusion in the face of some evidence that at least one managerial participant felt somewhat frustrated with Heath's efforts to enforce the Act.

32. Accordingly, the Board finds that Butler contravened section 24(1) of the Act in its treatment of Heath. Butler is directed to compensate Heath for his losses for the period of February 1, 1988 to May 2, 1988.

1187-88-R Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant v. **Careful Hand Laundry and Dry Cleaners Limited**, Respondent v. Group of Employees, Objectors

Certification - Membership Evidence - Practice and Procedure - New non-pay allegations made at hearing scheduled to inquire into earlier non-pay allegation - Board declining to allow these persons to be called - Involvement of officer is a necessary step in the Board's investigation - Panel should not proceed directly to its own inquiry - Earlier non-pay allegation dismissed

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. W. Pirrie* and *C. McDonald*.

APPEARANCES: *S.B.D. Wahl* and *F. DaSilva* for the applicant; *Stephen A. McArthur*, *Sidney H. Chelsky* and *Brenda Chelsky* for the respondent; *Jennifer Dailey* for the objectors.

DECISION OF THE BOARD; October 19, 1988

1. In this application for certification by Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 ("the union"), a differently constituted panel of the Board directed the appointment of a Labour Relations Officer to inquire into an allegation by Careful Hand Laundry and Dry Cleaners Limited ("the employer" or "Careful"), the respondent herein, that Merin Joesph had not paid \$1.00 when she signed an application for membership in the applicant union (see decision dated September 23, 1988, which also dealt with certain other preliminary matters). Following the Officer's inquiry, the matter was set down for hearing before this panel of the Board.

2. The Board conducts the initial inquiry of an allegation that an individual has not paid the requisite sum to the union ("the non-pay"), in this case, Merin Joesph, as well as the collector who signed the individual into membership and the Form 9 declarant, in this case the same person, Carlos Aedo, a paid organizer of the union. The other parties are allowed to question those witnesses, and to call evidence of their own. In this case, the union called Rheal Corneau as a witness; Mr. Corneau is also a paid organizer of the union. The employer called David Klegerman, its general manager.

3. The representative for the objecting employees, Jennifer Dailey, sought to call two witnesses who, she told us, had informed her the Thursday prior to the hearing that they had not paid any money to the union when they joined. She said she had not appreciated the importance of the \$1.00 payment until she had sat through the hearing the day before and it was only then that she remembered these individuals coming to her. Since we considered these to be new non-pay allegations, we declined to permit the witnesses to be called to testify that they had not paid \$1.00 for the purpose of impugning Mr. Aedo's credibility, should he be the collector involved in the signing of these cards, as suggested by counsel for the employer. We also declined to call Mrs. Dailey as a witness to explain how she heard about the two new non-pays, as suggested by counsel for the union. Whatever Mrs. Dailey could or would tell us would not be relevant to whether the Board will inquire into allegations of non-payment of initiation fees or dues to the union. When we returned from a second recess, Mrs. Dailey informed us that a third employee had just told her that he or she had not paid any money to the union. We appointed a Labour Relations officer to conduct the usual inquires into the three new non-pay allegations and informed the parties that if it is necessary for the Board to inquire further into these allegations, they would be dealt with on the next day of hearing before this panel, October 21, 1988, and, if required, on the subsequent dates

already fixed. We further advised the parties that we would rule on the non-pay allegation currently before us, independently of the recent allegations; we then heard argument on that allegation and reserved our decision.

4. We take this opportunity to make some observations about the Board's treatment of non-pay allegations which underlie our response to Mrs. Dailey's raising of these matters during the hearing. Clause 1(1)(l) of the *Labour Relations Act* ("the Act") defines a member of a trade union as including a person who "(i) has applied for membership in the trade union, and (ii) has paid to the trade union on his own behalf an amount of at least \$1.00 in respect of initiation fees or monthly dues of the trade union". The evidence filed by a trade union in support of its application for membership generally consists of applications for membership or "cards" (as in this case) or certificates of membership or both. The cards filed show on their face whether the person on whose membership the union relies as evidence of sufficient support for certification or a vote has applied for membership in the applicant trade union and has paid \$1.00 and the Board bases its determination of the application on the cards. Because of the Board's reliance on the documentary membership evidence and its reluctance to embark on oral inquiries in this regard "except to identify and substantiate the written evidence" (see subsection 73(2) of the Board's Rules of Procedure), the Board must be satisfied that it can indeed rely on the membership evidence filed by the union. Where allegations of non-pay or non-sign are made, since the representation (in the form of the card) on which the Board relies, that the person paid or signed, is impugned, the Board will investigate such allegations. Timeliness objections do not apply in the same way as they do in the normal case because the discovery that the card is false or a discrepancy between the card and what actually happened is not noted on the Form 9 constitutes, in effect, fraud on the Board. (The importance of the Form 9 in the Board's deliberations is set out in detail in *Pebra Peterborough Inc.*, [1988] OLRB Rep. Jan. 76.)

5. As we have said, the Board investigates allegations of non-pay whenever they are raised, but the allegation will not be heard by a panel of the Board unless the Board is satisfied there is a *prima facie* case of the relevant monies not being paid. In our view, the involvement of the Officer is a necessary step in the Board's investigation of non-pay allegations. Subsection 111(1) of the Act protects the identity of persons who are members of the union or desire to be represented by the union and of those who oppose the union and permits disclosure of the identity of such persons only with consent of the Board. Where a non-pay allegation is made, the extent of the disclosure of the identity of person alleged not to have paid is protected to the extent possible until the Officer's inquiry indicates there is a *prima facie* case of non-payment of initiation fees or dues (obviously, the party or individual making the allegation may know the person is a member of the union or opposes the union, but the other parties may and probably should not know). Only where there is a *prima facie* case will the name be revealed more extensively. The Officer's inquiry may also reveal that the union did not file a card for the person alleged not to have paid. While non-filing of a card can be determined without the involvement of an Officer, it is more consistent with the confidentiality provisions of the Act not to reveal whether the union has filed a card for a specific person or not; in other words, in our view, it would not be desirable for a panel before whom non-pay allegations have been raised for the first time to determine whether cards have been filed for the relevant persons and then, when it finds none has been filed, to inform the parties that it will not investigate the allegations further. Where there is not a *prima facie* case, it may be because the person has admitted that he or she incorrectly told someone he or she did not pay or there may have been a genuine misunderstanding (for example, someone signed a card and did not pay the \$1.00 immediately but in fact paid later, the former event being witnessed by someone who makes the allegation having not witnessed the latter). These considerations suggest that regardless of whether the allegations are sent to the Board in written form or raised at a hearing, an Officer

should be appointed and the panel should not proceed directly to its own inquiry or to determine itself whether it should conduct an inquiry.

6. It is not in dispute that Ms. Joesph signed the application for membership on August 18, 1988, on her way home from work away from the plant, that she signed the side bar of the card under the words "I confirm payment of the Initiation Fee", and that she received a receipt which Mr. Aedo tore off the application card.

7. Ms. Joesph says that she did not in fact pay \$1.00 to the union. She told the Board that Mr. Aedo had told her people paid \$1.00 but she told him she did not have \$1.00; yet in response to a question from union counsel, she said Mr. Aedo did not tell her to pay \$1.00. Initially, she said several times that she wrote in the amount "1.00" in the appropriate blank on the side bar of the card, but later, under cross-examination, said she did not remember if she did. It is clear on the face of the cards collected by Mr. Aedo that the amount of \$1.00 appears in the same hand on all the cards and it is clear to us that Mr. Aedo wrote in the amount, not Ms. Joesph. Ms. Joesph told us that she had spoken to Mrs. Dailey the next morning, August 19th telling her that she had signed the card and something of the conversation with Mr. Aedo. Mrs. Dailey asked her why she signed and invited Ms. Joesph to sign "a paper against the union"; Ms. Joesph did so. Although she related the conversation with Mrs. Dailey three times, she did not say that she had told Mrs. Dailey that she had not paid any money to the union. Only when she was specifically asked by counsel for the union whether she had told Mrs. Dailey about the failure to pay \$1.00, did Ms. Joesph inform us that in response to Mrs. Dailey's asking her if she had paid any money, did she, Ms. Joesph, answer "Why? he didn't tell me I had to pay anything". Mrs. Dailey was the only person Ms. Joesph spoke to about the \$1.00 until she was called by counsel for the employer the morning of the first day of hearing into this application, September 9, 1988 (the non-pay allegation was not raised until the morning of September 9, 1988.) We are satisfied that on Ms. Joesph's testimony that Mrs. Dailey raised the \$1.00 with her and that only she or Mrs. Dailey could have told the employer that Ms. Joesph had not paid \$1.00. Despite these inconsistencies in Ms. Joesph's testimony, she never wavered from her statement that she had not paid \$1.00 to Mr. Aedo when she signed the card. She told us she did not ask why she should sign saying she had paid \$1.00 when she had not, nor why she would accept a receipt for payment of money she had not paid. She said she had not read the card because she was in a hurry to get home.

8. Mr. Aedo testified that he had been told that there were two people in Careful's plant who were interested in joining the union and that Ms. Joesph was one of them. Although he had worked at the plant in order to organize the workers, Ms. Joesph had begun working there after he had left Careful's employ and he did not know her; she was described to him, however, and on August 18th, while he waited about a block and a half from the plant, he saw her leave the plant and begin, as he believed, walking home. He knew generally where she lived, but not her specific address. He took a different route than she did, parked on Caledonia in a parking lot, near Glen Park, and crossed the street to approach Ms. Joesph. He had her sign a card, took a \$1.00 bill from her, filled in the \$1.00 amount, had her sign the acknowledgement that she had paid \$1.00, signed to indicate he had received \$1.00, filled out the receipt and gave it to her.

9. Ms. Joesph and Mr. Aedo recounted different versions of the content of the conversation, but on either recounting we are satisfied that Ms. Joesph believed the union would be a benefit to her and she willingly signed a card. She does not deny she signed the card, although it is clear she later regretted it after hearing what Mrs. Dailey had to say about unions. Nor do the differing versions assist us in determining the credibility of the witnesses since either version is a credible account of what might be said when a union organizer tries to sign up members.

10. There was a witness to the events occurring between Mr. Aedo and Ms. Joesph and that was Mr. Corneau who had followed Ms. Joesph, without any prior discussion with Mr. Aedo, in his car (he also did not know her but said it was easier to follow her because she was walking than employees who took a bus, for example). His job was to follow employees home to obtain their home address to allow other organizers to approach employees at home if necessary. That was why he followed Ms. Joesph, but when he saw Mr. Aedo approaching her, he parked beside Mr. Aedo's car in the parking lot to see what would happen; if she had not signed a card, he would have followed her home. He told us that he saw Mr. Aedo take a card out of his briefcase, Ms. Joesph sign the card and give Mr. Aedo money in the form of a bill (he could not see the denomination), Mr. Aedo tear off part of the card and give it to Ms. Joesph and then put the card and money in his shirt pocket. Mr. Aedo crossed the street and showed the card and \$1.00 to Mr. Corneau through the latter's car window.

11. Counsel for the employer argued that the coincidence of Mr. Corneau's and Mr. Aedo's following the same person and Mr. Corneau's close corroboration of Mr. Aedo's recitation of events (for example, they both said Mr. Aedo held out his briefcase for Ms. Joesph to use as a table, while Ms. Joesph denied that, and Mr. Aedo said that Ms. Joesph had a "black" purse while Mr. Corneau described it as a "dark" purse), as well as his admission that this was the only signing he saw in this campaign, made the testimony of these witnesses so incredible as to be totally unreliable or, as he put it, to lead us to conclude it had to be a fabrication. Obviously testimony that Mr. Corneau just happened to follow the same person who turned out to be the subject of a non-pay allegation has to be weighed by the decision-makers; but that will be in the context of the internal consistency of the testimony of the witnesses, the nature of inconsistencies, the way in which inconsistencies are revealed, as well as the demeanour of the witnesses.

12. We are satisfied that while it may be described as a "stroke of luck" that Mr. Corneau observed Ms. Joesph's paying the \$1.00, the circumstances of his being there are not so inherently incredible that we should reject his and Mr. Aedo's testimony on that basis. Taking all the factors into account, including Ms. Joesph's change of heart with respect to who put the \$1.00 on the card and the content of her conversation with Mrs. Dailey, on the one hand, and the way in which both Mr. Aedo and Mr. Corneau gave their evidence, we prefer the testimony of Mr. Aedo and Mr. Corneau over that of Ms. Joesph.

13. Mr. Aedo is also the Form 9 declarant. Since we find that Ms. Joesph did pay \$1.00 we do not have to consider the Form 9, but we took into consideration Mr. Aedo's response to questions relating to the Form 9. He understands the importance of the Form 9. He said that he had received instructions from Fernando DaSilva, an official of the union, that every time "we sign a person, we witness the signature and make sure that the person paid \$1.00". He said the law requires the collector to obtain \$1.00 from the potential member and that if he does not get the \$1.00, he does not fill in the card and does not sign the Form 9. He had been told that before he signed the Form 9 he had to make sure everybody had paid \$1.00, had signed the card and the cards were dated. There was one other collector and Mr. Aedo checked with him everyday and asked him whether he had witnessed every signature and whether the people paid a \$1.

14. We find that Ms. Joesph did pay \$1.00 in respect of an initiation fee to join the applicant and that therefore there is no reason on this basis to reject the membership evidence.

15. There are the following outstanding issues to be considered by us: an allegation that an employee was threatened with jail if she did not join the union, an allegation of harassment of employees, a relevant petition and the three non-pay allegations brought to the Board's attention by Mrs. Dailey. Although a counter-petition was filed by the union, it is not relevant since the

overlap in signatures of those persons who signed applications for membership, the statement opposing the union and the counter-petition is not sufficient to warrant an inquiry by the Board: even if it were voluntary, it could not be said to negate the effect of a voluntary petition.

0424-88-R; 0658-88-U United Brotherhood of Carpenters' and Joiners of America Local Union 27, Applicant v. 704039 Ontario Limited, carrying on business as **Construction 2000**, Respondent v. Labourers' International Union of North America, Local 183, Intervener v. Group of Employees, Objectors; United Brotherhood of Carpenters and Joiners of America, Local 27, Complainant v. 704039 Ontario Limited, carrying on business as Construction 2000, Respondent

Abandonment - Certification - Collective Agreement - Construction Industry - Whether certification application barred by an alleged pre-existing collective agreement between the employer and the Labourers Union - Labourers Union withdrawing its intervention and choosing not to assert its bargaining rights as a bar - Board therefore finding no bar - Board also finding that Labourers Union abandoned its bargaining rights for carpenters when it withdrew its intervention - Not open to Labourers Union to refuse to defend bargaining rights which it claimed to hold where the existence of those rights have been placed directly in issue and still purport to retain them for some other purpose

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *M. Eayrs* and *H. Kobryn*.

APPEARANCES: *J. David Watson* and *Joe Almeida* for the applicant/complainant; *B. L. Mendrycki* for the respondent; *J. Sack* and *Tanya Lee* for the intervener; *Jeff Robinson* and *Rocco Urlando* for the objectors.

DECISION OF THE BOARD; October 21, 1988

1. At a hearing held July 21, 1988, into these matters, the Board received the evidence of the parties with respect to a threshold issue of whether the application for certification was barred by an alleged pre-existing collective agreement between the respondent and the Labourers International Union of North America, Local 183 ("the Labourers"). In other words, the Labourers are claiming that, pursuant to an alleged collective agreement with the respondent, it holds the bargaining rights for the respondent's employees whom the applicant is seeking to represent. The issue had been raised by the Labourers' intervention. The Labourers' claim was contested by the applicant in a letter to the Board dated July 15, 1988. At the hearing, Al Mendrycki, President of the respondent, acknowledged that he was aware at the time the application was made of the Labourers' claim to represent the respondent's employees affected by the application. He also stated that there was a collective agreement between the Labourers and the respondent which had been signed on August 5, 1987 to be effective from May 4, 1987 to April 30, 1989. This application was made May 12, 1988.

2. The applicant's July 15th letter challenged the claimed collective agreement bar on two grounds. First, the applicant alleged that the Labourers were not entitled to represent the employees in the bargaining unit at the time the collective agreement was entered into and, in this respect, was relying on section 60 of the *Labour Relations Act*. The applicant also took the position that the

collective agreement was entered into contrary to clause (a) of section 48 of the Act. These sections provide as follows:

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purpose of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; or

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60.-(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.

3. For the reasons given in its decision which issued August 11, 1988, the Board directed the parties to make their submissions on the issues to the Board in writing. The Board has received the submissions as directed. The submissions made by Labourers' counsel in rebuttal of the submissions from the respondent and the objectors are set out in the following text from a letter to the Board dated September 30, 1988:

We have now had an opportunity to review the written submissions filed by Construction 2000, Division of 704039 Ontario Limited, and the Group of Employees, with our client. It is clear that these two parties take the position that Local 183 and Construction 2000 are not parties to a collective agreement.

In these circumstances, Local 183 no longer feels compelled to raise its collective agreement with Construction 2000 as a bar to this certification application. Accordingly, Local 183 hereby withdraws its intervention and the collective agreement bar upon which it is based.

Local 183 is changing its original position in this case, without prejudice to its position that the collective agreement signed between Local 183 and a contractor in the circumstances of this case is a lawful and binding collective agreement. However, in this particular case, Local 183 chooses not to assert its bargaining rights as a bar to the application by the Carpenters'. Local 183 does not intend to take any further part in these proceedings.

Accordingly, in these circumstances, there is no need for the Board to adjudicate on the issues respecting the status of the collective agreement between Local 183 and Construction 2000.

4. There is no doubt that the objectors' submissions dispute the validity of the collective agreement between the Labourers and the respondent. While there are ambiguities in the respondent's submissions, the final paragraph of the submissions contains the following statement:

In conclusion, Construction 2000 does not feel that the collective agreement, [sic] it currently has with Local 183 is a legal one because of the way in which it was presented to both myself and the employees of Construction 2000.

The applicant's submissions, of course, continue to dispute the validity of the collective agreement. Since the Labourers have withdrawn their intervention and chosen not to assert their alleged bargaining rights for carpenters and carpenters' apprentices employed by the respondent, and since the other parties have taken the position that there is no valid collective agreement between the Labourers and the respondent, there is no party to the proceeding who is contending that the bargaining rights sought by the applicant are already held by the Labourers. Therefore there is no bar to the application for certification.

5. In the alternative, even if the Board has erred in reaching the foregoing conclusion, it would still find that the Labourers do not hold bargaining rights for the respondent's carpenters and apprentices. This is because, to the extent that the Labourers held such rights, they abandoned those rights when they withdrew their intervention and decided not "...to take any further part in these proceedings." in the face of a clear challenge to their claim that they hold bargaining rights pursuant to a collective agreement with the respondent. Thus the Labourers no longer can claim to represent the respondent's carpenters and carpenters' apprentices.

6. The Board notes the Labourers' assertion that the change in their original position in this case is without prejudice to their claim that "...the collective agreement signed between [the Labourers] and a contractor in the circumstances of this case is a lawful and binding collective agreement.". It is not open to the Labourers, in the Board's view, to refuse to defend bargaining rights which they have claimed to hold where the existence of those rights have been placed directly in issue, as clearly they have here, and still purport to retain for some other purpose those rights and the collective agreement which purports to have created them. Pursuant to clause (e) of subsection 1(1) of the Act, a collective agreement must be between an employer and a trade union which represents employees of the employer. Since the Labourers have abandoned any bargaining rights which they might have held for carpenters and carpenters' apprentices employed by the respondent, to the extent that the agreement between the Labourers and the respondent purports to include such employees, it would not satisfy that requirement. Therefore, the Board finds that the agreement between the Labourers and the respondent on which the Labourers had relied to intervene in this proceeding is not a collective agreement within the meaning of the Act respecting carpenters and carpenters' apprentices employed by the respondent.

7. In the result, the Board finds that there is no bar to the application for certification made May 12, 1988 by the United Brotherhood of Carpenters' and Joiners of America Local Union 27.

8. These matters are scheduled for continuation of hearing on November 8 and 9, 1988 for the purpose of receiving the evidence and representations of the parties respecting all matters arising out of and incidental to the application in File No. 0424-88-R and the complaint in File No. 0658-88-U, including in particular the weight, if any, to be given to the statements contained in the respondent's letter dated May 27, 1988, in the application for certification.

9. The application and complaint are referred to the Registrar for listing for hearing.

0702-88-M London and District Service Workers' Union, Local 220, S.E.I.U.-A.F.L.-C.I.O.-C.L.C., Applicant v. The Freeport Hospital, Respondent

Employee Reference - Practice and Procedure - Board reviewing procedure for processing s.106(2) applications - Respondent's request to dismiss application on ground that applicant not complying with information requirements in *Windsor Star* dismissed - Board directing the examination of some of the persons in dispute

BEFORE: *S. A. Tacon*, Vice-Chair, and Board Members *D. A. MacDonald* and *B. L. Armstrong*.

DECISION OF THE BOARD; October 24, 1988

1. This is an application under section 106(2) of the *Labour Relations Act* in which the applicant is seeking a determination as to whether a number of individuals are "employees" within the meaning of the Act. It is convenient to list those persons here, together with their titles, according to the respondent: Susan Klem, personnel secretary; Marion Mueller, executive secretary, human resources; Susan Diehl, office manager; Patricia Kahle and Denis Brand, dietetic technician; June Weiler, executive secretary, patient care services; Debbie Wall, supervisor, central communications; Barb Howell, patient librarian; Joan Ginn, staff librarian; Gloria Baker, coordinator, staff education; Marion Chiapetta, executive secretary, community relations.

2. In *The Windsor Star*, [1988] OLRB Rep. April 427 at paragraph 14, the Board outlined the information which thenceforth would be required in section 106(2) applications:

14. Therefore, the Board will no longer restrict the evidence to be adduced before a Board Officer with respect to the duties and responsibilities of the person(s) in dispute to "changes" in those duties and responsibilities, as in the past. Section 106(2) applications commonly are initiated through an often sparse letter to the Board merely naming the individual(s) in dispute. Henceforth, the applicant must, in addition, indicate the basis for the application, i.e., the nature of the position, including duties and responsibilities (to the extent known, where the applicant is a trade union), the historical dimension to the position (if any) including any Board determinations and parties' agreements and how the mischief against which sections 1(3)(b) or 12 are directed has arisen or has ceased. The respondent must outline fully any grounds it asserts as to why the Board should not entertain evidence as to the duties and responsibilities of the person(s) in dispute. The Board must be satisfied a "question" has arisen as to the "employee" or "guard" status of the individual(s) in dispute before a duties and responsibilities examination will be directed. Where the individual's status has not been previously determined by the Board in a certification or earlier 106(2) application or by specific agreement of the parties, an examination will generally be directed. Where the Board has previously determined the status of a person in a certification application or prior section 106(2) application or where the parties have reached a specific agreement as to the person's status, the Board will not permit evidence as to the person's duties and responsibilities to be adduced before a Board Officer unless the Board is satisfied, on the face of the application, that it appears the mischief against which section 1(3)(b) or section 12 is directed has arisen or has ceased. Where the Board is not so satisfied, the application may be dismissed without a hearing. In the Board's opinion, this policy does not undermine agreements of the parties as to the person's status and avoids repeated or frivolous examinations, yet provides sufficient flexibility to adequately respond to circumstances where the mischief against which sections 1(3)(b) and 12 are directed has arisen or has ceased.

3. When an application under section 106(2) is received, the Registrar acknowledges the application, directs the applicant's attention to the relevant passages in *The Windsor Star* decision, *supra*, and establishes a deadline for receipt of the required information. The applicant's materials are circulated to the respondent for reply by a specified date and the respondent, as well, is directed to the relevant excerpt from *The Windsor Star*, *supra*. Finally, the respondent's reply, if

any, is circulated to the applicant for comments, again, with a deadline established. The Board considers the material filed and, in the context of the principles set out in *The Windsor Star, supra* (paragraphs 8 to 15 in particular), either appoints a Board Officer to conduct a duties and responsibilities examination of the person(s) in dispute or declines to do so.

4. In this instance, the applicant's correspondence with the Board is dated June 15, July 11, July 18 and October 3, 1988. The first two letters merely give the incumbents of the positions in dispute. The July 18 letter indicates that the individuals, in the applicant's view, are in the bargaining units apparently because positions are not exempted in the certificate issued by the Board in 1984 and/or because the persons are neither supervisors nor are employed in a confidential capacity in matters relating to labour relations. The respondent's letter of August 2, 1988 outlines its view of the duties and responsibilities of the persons referred to in paragraph 1 above, in considerable detail, its assertions with respect to the status of each, and submits the application should be dismissed given its material filed and/or because the applicant has not complied with the information requirements in *The Windsor Star, supra*. In its final letter of October 3, 1988, the applicant disputes the respondent's assertions as to the duties and responsibilities of the individuals, generally and individually, and implies that the job titles and descriptions do not accurately reflect the actual functions.

5. The Board, as noted in *The Windsor Star, supra*, will not appoint a Board Officer to conduct a duties and responsibilities examination unless the material before the Board, on its face, appears to indicate that the mischief against which section 1(3)(b) is directed has arisen or ceased. When the applicant's material is taken together, the Board considers that the informational requirements have been satisfied. In making this assessment, the Board must be sensitive to the position of a trade union applicant which may not have as complete a view of the duties and responsibilities as a respondent. However, an application may well be dismissed or not processed further whether the initial material filed by the applicant fails to provide the necessary information, as noted in *The Windsor Star, supra*.

6. In its application, the applicant asserted that the disputed persons should be included in the bargaining unit because those individuals did not fall within either branch of section 1(3)(b) and because the exclusions in the certificate were inapplicable. The respondent asserted several of the individuals were "managerial" within the meaning of section 1(3)(b) (i.e., Susan Diehl, Patricia Kahle, Denis Brand, Debbie Wall and Gloria Baker). In addition, all but Wall and Baker were to be excluded as "supervisors" or "persons above the rank of supervisor". With respect to Susan Klem, Marion Mueller and June Weiler, the respondent contended they should be excluded on the second branch of section 1(3)(b) relating to confidentiality and based on the exclusion in the certificate. Marion Chiapetta was to be excluded on the "confidential" branch of section 1(3)(b) as well. Finally, with regard to Barb Howell, the respondent contended that she had held the position for many years and as she was excluded at the time of certification, that exclusion should continue. Joan Ginn should be excluded as more senior to Barb Howell, i.e., if the latter was not in the bargaining unit, the former should likewise not be covered.

7. In the Board's view, both parties have, to some extent, confused the issue which is before the Board in a section 106(2) application. Specifically, the Board is to determine the "employee" (or "guard") status of the person in dispute. The question as to whether the persons fall within the scope clause of the collective agreement (and the scope clause supersedes the original certificate) is for an arbitrator to determine: see *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500; *Northern Telecom*, [1983] OLRB Rep. July 1134. In some circumstances, a Board determination of the individual's status as an "employee" or otherwise implicitly will resolve an issue of the extent of the collective agreement's scope clause. Where, however, the issue solely involves the

inclusion in or exclusion from the bargaining unit, the Board will decline to direct an examination in a section 106(2) application. It appears to the Board on the material filed that the dispute between the parties with respect to Barb Howell, patient librarian, and Joan Ginn, staff librarian, is restricted to their inclusion in or exclusion from the bargaining unit - an issue which should be resolved at arbitration. Hence, given the jurisprudence noted, the Board declines to direct an examination of those two persons and, in respect of those two, the application is dismissed.

8. With reference to the other positions, having regard to the material filed, the Board is satisfied that a "question" exists as to their "employee" status and the mischief against which section 1(3)(b) is directed may no longer exist. In *The Windsor Star*, *supra*, the Board rejected the artificiality of focusing on the timing of the application as a vehicle for directing a "full" examination or one restricted to "changes". That is, where a Board Officer is appointed, a full duties and responsibilities examination is conducted and the question of "changes" moves to an evidentiary matter where the *status quo*, the duties and responsibilities of the disputed individual(s) (including any changes thereto) and the historical context become matters of evidence to be given the appropriate weight in each case. Accordingly, a Board Officer is hereby appointed to inquire into the duties and responsibilities of the individuals named in paragraph 1 above except Barb Howell and Joan Ginn.

9. This matter is referred to the Registrar in accordance with the foregoing.

0330-88-R, 0331-88-G United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Ian Somerville Construction Ltd., Robert Ian Somerville, c.o.b. as Somerville Construction Management and 671860 Ontario Inc. c.o.b. as Somerville Construction, Respondents

Construction Industry - Related Employer - Whether a gap of five and one half years between the winding-up of one company and the start of another affects the determination of whether the two business constitute related or associated activities - Whether it is appropriate to grant the one employer declaration given the gap - Gap not determinative of relatedness issue - Businesses found to carry on related or associated activities - Board exercising its discretion to grant declaration

BEFORE: Ken Petryshen, Vice-Chair, and Board Members M. Eayrs and H. Kobryn.

APPEARANCES: Leanne Chahley and Jim Smith for the applicant; Daniel J. Shields and Ian Somerville for the respondents.

DECISION OF THE BOARD; October 20, 1988

1. This application is amended to reflect the addition of 671860 Ontario Inc. c.o.b. as Somerville Construction as a respondent in both applications.

2. The Board has two matters before it. Board File No. 0331-88-G is a referral of a grievance to arbitration pursuant to section 124 of the Act. At the commencement of the hearing, the parties agreed that this matter be adjourned *sine die* and accordingly, with leave of the Board, Board File No. 0331-88-G is adjourned *sine die*. Board File No. 0330-88-R is an application under

section 63 and subsection 1(4) of the Act. In this application, the United Brotherhood of Carpenters and Joiners of America, Local 27 (hereinafter referred to as "Local 27") alleges that there has been a sale of a business from Ian Somerville Construction Ltd. (hereinafter referred to as "ISCL") to 671860 Ontario Inc. c.o.b. as Somerville Construction (hereinafter referred to as "671860"). Local 27 also alleges that ISCL, Robert Ian Somerville c.o.b. as Somerville Construction Management and 671860 constitute one employer for purposes of the *Labour Relations Act*.

3. Since Local 27 sought to add 671860 as a party subsequent to the posting of the Notice to Employees of the application, the Board raised with the parties at the hearing the question of whether the employees of 671860 received notice of the application. After entertaining the parties' submissions on this point, the Board advised the parties that it would proceed with the hearing but that it would send a notice of the application to each of the employees. The Board did send a notice, with a copy of the application attached, to each employee advising that if any employee wished to make representations to the Board concerning the application, the employee should do so by sending a written statement to the Board no later than October 11, 1988. No employee responded to the notice.

4. The only witness called was Robert Ian Somerville and the facts are not in dispute. Robert Somerville incorporated a company called Robert Somerville Construction Ltd. and in the fall of 1978 changed the name to ISCL since an objection was made to the name of the original company. ISCL started out on a very small scale performing landscaping work and some minor civil work. In its first year, the company operated out of Robert Somerville's home, had two employees, owned no equipment and the dollar volume of its business was \$250,000.00. Robert Somerville was the sole officer and director of ISCL. He owned eighty per cent of the common shares while the remaining shares were owned by someone who was not involved in the day to day operation of the company.

5. Until the spring of 1982, ISCL expanded its business and employee complement. In 1980, ISCL moved into commercial premises where it leased space. Between 1979 and 1981, ISCL was engaged in site upgrading, landscaping, some structural repairs, some small civil works and a fair bit of residential work. ISCL's employee complement peaked at approximately twenty-five employees. In addition to office staff, it employed an estimator, a landscape architect, a site supervisor, a couple of operating engineers, a couple of carpenters and labourers. It owned some light earth moving equipment, a dozer, a backhoe and some trucks. Its significant customers were the Metro Toronto Housing Corporation, City Home and Harbourfront Corporation. In 1981, the business grossed a little more than \$1.2 million. ISCL did perform some work, although not a significant amount, in the ICI sector of the construction industry. In 1982 it bid on an ICI job at Ontario Place but was not awarded the contract. It also subcontracted out work rather than utilize its own workforce when it was appropriate to do so.

6. In November 1981, ISCL entered into a voluntary recognition agreement with the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America for a bargaining unit of "all journeymen and apprentice carpenters, other than millwrights, employed by the Employer in the Province of Ontario and engaged in the industrial, commercial and institutional sector of the construction industry". This agreement specifically provided that ISCL shall be bound to the Carpenters' provincial agreement. ISCL also had collective agreements with locals of the Labourers and Operating Engineers.

7. As a result of financial difficulties, ISCL became insolvent by the spring of 1982 and was wound up. It did not go bankrupt or into receivership. The equipment it had was disposed of by auction and the employees were gradually laid off. No arrangements were made to dispose of the

goodwill, there were no customer lists to pass on and no accounts receivable. ISCL's charter was revoked by the Province for the non-filing of provincial tax returns. Between March 1982 and the fall of 1987, Robert Somerville was not a principal of a company engaged in work in the construction industry. During this time, he was an employee of a number of construction companies and worked for some of them in the capacity of a project manager. In March 1984, he registered the name Somerville Construction Management and two of the employers he worked for paid him in the name of Somerville Construction Management. On the evidence before us, we are satisfied that Somerville Construction Management did not carry on business as a construction contractor.

8. In the fall of 1987, 671860 began to carry on business in the construction industry. Linda Somerville, Robert Somerville's wife, is a director, sole officer and shareholder of 671860. Although he does not have an ownership interest in the company, Robert Somerville is in charge of the day-to-day operation of 671860. For example, he is the one who determines what jobs the company will bid on. In addition to employing Robert Somerville, 671860 employs a site supervisor and a labourer. Robert Somerville does not want at this time to have 671860 engage in work which is labour intensive. Most of the work 671860 obtains is subcontracted out. 671860 owns some small tools and a pick-up truck. Between the fall of 1987 and May 1988, 671860 did one residential job and some leasehold improvement work for City T.V. The bulk of 671860's work during this period has been for Ontario Place as a general contractor in the ICI sector of the construction industry. 671860 has entered into four such contracts with Ontario Place for a combined dollar value of approximately one million dollars. Part of the work subcontracted out by 671860 at Ontario Place was carpentry work.

9. We do not propose to set out the submissions of counsel in detail. Counsel for Local 27 argued that her client was entitled to relief under section 63 and subsection 1(4) of the Act. Counsel for the respondents argued that there is no basis for either claim. With respect to the subsection 1(4) application, counsel for the respondents took the position that the activities of ISCL and 671860 are not related or associated. As well, counsel argued that even if it should find the two companies to be related or associated, the Board should not exercise its discretion to grant a subsection 1(4) declaration given the passage of approximately 5½ years from the winding up of ISCL and the initiation of the business of 671860.

10. The relevant parts of section 63 and subsection 1(4) of the Act read as follows:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination

thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

11. Section 63 of the Act is designed to ensure that when a business or part of a business is disposed of, the purchaser acquires it subject to the collective bargaining obligations of the vendor. Before granting relief under section 63, the Board must be satisfied that a business or a part of a business has been sold. In the instant case, no assets or anything else of significance were transferred from ISCL to Robert Ian Somerville c.o.b. as Somerville Construction Management or to 671860. The facts disclose that the business or part of the business of ISCL was not disposed of at all, let alone to Robert Ian Somerville c.o.b. as Somerville Construction Management or to 671860. Accordingly, the application as it relates to section 63 of the Act is dismissed.

12. Before the Board can exercise its discretion under subsection 1(4) to declare that certain entities constitute one employer for the purposes of the Act, three conditions must be satisfied. There must be more than one corporation, firm or individual association or syndicate involved. The entities must be under common control or direction. And finally, the entities must be engaged in associated or related business activities. Subsection 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously.

13. As noted earlier, Local 27 seeks subsection 1(4) relief against ISCL, Robert Ian Somerville c.o.b. as Somerville Construction Management and 671860. Since the evidence discloses that Robert Ian Somerville c.o.b. as Somerville Construction Management did not carry on business as a construction contractor, or for that matter, did not carry on any business, the subsection 1(4) application as it relates to Robert Ian Somerville c.o.b. as Somerville Construction Management is dismissed. We turn then to the question of whether ISCL and 671860 constitute one employer for the purposes of the Act.

14. Counsel for the respondents agreed that two of the conditions necessary for a subsection 1(4) declaration have been satisfied. Counsel noted that the instant case clearly involves more than one corporation and that ISCL and 671860 are under the common control and direction of Robert Somerville. Robert Somerville ran ISCL and the evidence discloses that he exercises effective direction and control over 671860. As noted earlier, counsel for the respondents contends that there are two questions the Board must answer. The first question is whether the 5½ year gap between ISCL's demise and the start of 671860 affects the determination of whether the two businesses constitute related or associated activities. The second is whether, given the 5½ year gap, it is appropriate for the Board to exercise its discretion to grant subsection 1(4) relief. Counsel submitted that if the business of ISCL ceased on a Friday and the business of 671860 began on the following Monday, it would be difficult to conclude that the two businesses in this case are not related. However, given the gap of 5½ years, counsel submitted that the businesses are not related or associated. When it came to the second question concerning the exercise of its discretion, counsel submitted that the business of ISCL died in 1982 and the gap of 5½ years should lead the Board to conclude it was inappropriate to grant Local 27 the relief it requested.

15. In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, the Board makes the following comments concerning the interpretation of the words "associated or related activities or businesses" at paragraph 15:

... It is not necessary to have shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. Business or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If

these criteria are met, two businesses may be “related” within the meaning of section 1(4) even though their activities are carried on through different corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of “privity of contract” or “the corporate veil”.

16. In determining whether certain respondents are engaged in associated or related activities or businesses, the Board is concerned with the nature of the businesses. If the businesses or activities are related, the existence of a gap of two days or a greater period of time is of little significance. In other words, the gap in and of itself is not determinative of the relatedness issue. In this case, ISCL was and 671860 is engaged in work in the construction industry. Both ISCL and 671860 performed work in the residential sector. 671860 subcontracts most of its work but ISCL, on occasion, subcontracted out work as well. On the facts of this case, particularly given the nature of the work performed by ISCL and 671860, we are satisfied that ISCL and 671860 carry on associated or related activities or businesses even though a 5½ year gap is present. As the Board has noted in previous decisions, firms engaged in the construction business can easily become involved in various sectors of construction work depending on business opportunities and, when they do, it is difficult to say that the activities are unrelated (see *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720).

17. In arguing the issue of the exercise of the Board’s discretion, counsel for the respondents referred to the decision in *Roy Brandon Construction*, [1981] OLRB Rep. Feb. 219 at paragraph 9 where the Board made the following obiter comment: “The two businesses, in other words, although unrelated in time, may be so identical in their essential makeup as to be considered ‘associated or related’ within the purpose and meaning of section 1(4) (although there may be a point at which the hiatus is so significant that it would be inappropriate to say that the section applies)”. We have some difficulty with the view that the length of the hiatus could affect the application of subsection 1(4) of the Act. In any event, the Board is satisfied that the gap of 5½ years on the facts before us should not lead us to decline to grant the relief requested by Local 27.

18. The purpose of subsection 1(4) is set out in the following passage in *Brant Erecting and Hoisting, supra*, at paragraph 12:

... Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 [now section 63] which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. ...

19. The economic activity of ISCL that gave rise to a collective bargaining relationship with Local 27 is, in effect, now carried on by 671860. The two entities are engaged in related activities under common control and direction. We are unable to discover any labour relations reason in these circumstances for concluding that the bargaining rights of Local 27 should not attach to the “definable commercial activity” simply because that activity is carried on through another legal entity 5½ years after ISCL ceased operating. If Robert Somerville revived ISCL in 1987 to carry on the work now performed by 671860, there would be no question that the bargaining rights of Local 27 would continue. The fact that Robert Somerville elected not to revive ISCL but rather to utilize another corporate vehicle to carry on a related business 5½ years later is not a compelling

reason to decline to exercise our discretion in Local 27's favour. After reviewing all of the circumstances, including the 5½ year gap, we find that this is an appropriate case to exercise our discretion in favour of granting Local 27 the relief it seeks.

20. Accordingly, the Board declares that ISCL and 671860 are one employer for the purposes of the *Labour Relations Act* and that 671860 is bound by the Carpenters' provincial agreement.

1361-87-R; 1562-87-U Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **J. Sousa Contractor Limited**, Respondent v. Group of Employees, Objectors; Labourers' International Union of North America, Ontario Provincial District Council, Complainant v. **J. Sousa Contractor Limited**, Respondent

Certification Where Act Contravened - Discharge for Union Activity - Evidence - Petition - Unfair Labour Practice - Board discussing relevancy of a petition in a s.8 application - Mixed onus situation - Onus not necessarily dictating the order of proceeding - Applicant required to go first - Tape recording admissible in evidence - Layoffs and threat to close down if unionized breach of Act - Union certified

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Ronson* and *R. Montague*.

APPEARANCES: *Murray Gold* and *Victor Claro* for the applicant/complainant; *Peter M. Whalen* and *Jack Sousa* for the respondent; *Peter Milliken* for the objectors.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR AND BOARD MEMBER R. MONTAGUE;
October 17, 1988

1. Jack Sousa Contractor Ltd., the correct name of which is J. Sousa Contractor Limited, and Jaso Corporation are separate legal entities but were named as one respondent in both these matters, without any request for relief under section 1(4) of the *Labour Relations Act*. At the hearing, it was represented that Jaso Corporation had no employees on the date of application or since and, on that basis, the applicant/complainant trade union elected to proceed against J. Sousa Contractor Limited without prejudice to its right to seek relief under section 1(4) in the future. Accordingly, the name of the respondent in both matters was amended to "J. Sousa Contractor Limited".

2. Board File No. 1361-87-R is an application for certification. Board File No. 1562-87-U is a complaint under section 89 of the Act in which it is alleged that the respondent has breached sections 64, 66 and 70 of the *Labour Relations Act* in that it laid off certain employees because they supported, or it thought they supported, the applicant, and threatened to curtail or cease its operations if it was unionized. The application contains a request that the Board certify the applicant pursuant to section 8 of the Act. In support of that request, the applicant relies upon the same allegations made in the complaint. Accordingly, the Board directed that the two matters be consolidated and they proceeded together.

3. The applicant is a council of trade unions within the meaning of section 1(1)(g) of the *Labour Relations Act*. Locals 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 of the Labourers' International Union of North America, all of which are trade unions within the meaning of section 1(1)(p) are the constituent trade unions of the applicant and have vested in it the appropriate authority to enable the applicant to discharge the responsibilities of a bargaining agent within the meaning of section 10(1) of the Act. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency which, pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, is the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council.

4. The application is one within the meaning of section 119 of the Act and is made pursuant to section 144(1) of the Act which provides:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

5. The applicant has requested that the Board certify it for what is, in effect, its standard construction industry bargaining unit, described, in paragraph 7 of the application, as:

All construction labourers in the employ of the respondent in the Industrial, Commercial and Institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the Respondent in all other sectors of the construction industry in Ontario Labour Relations Board Area No. 29, save and except non-working foremen and persons above that rank.

In its reply, the respondent substantially agreed with the applicant's description of the bargaining unit but subsequently, at the hearing, asserted that an all employee unit was appropriate under the circumstances.

6. The designation orders issued pursuant to section 139(1) of the Act describe the provincial units of employees contemplated by the province-wide collective bargaining scheme established by the Act for the industrial, commercial and institutional ("ICI") sector of the construction industry and designate, for each such unit, an employee bargaining agency. In effect, such orders designate the trades or crafts which "belong" to each employee bargaining agency and its affiliated bargaining agents. As a result, employee bargaining agencies, and their affiliated bargaining agents, can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a craft or trade they have been designated to represent (see *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction*, [1983] OLRB Rep. March 407; *Superior Plumbing and Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228). Consequently, in applications for certification under section 144(1) of the Act, the Board cannot describe a bargaining unit in a manner which is inconsis-

tent with the relevant designation order. To accommodate the designation system, and recognizing that trade union representation in the construction industry has traditionally been along trade or craft lines, the Board's practice, in applications such as this, is to describe bargaining units in terms of the relevant trade or craft, as stipulated by the relevant designation order.

7. Accordingly, the Board ruled (orally) that, pursuant to section 144(1) of the Act, all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

8. On the basis of the material filed, and having regard to the agreement of the parties, the Board found that there were twenty-nine employees in the bargaining unit on the day the application was made.

9. The applicant filed ten pieces of documentary evidence of membership in support of its application. These consist of combination applications for membership and attached receipts. Each contains the original signature of the individual to whom it pertains and the receipts, which are countersigned by the collector, indicate that a payment of \$1.00 was made to the applicant with respect to membership fees within the six-month period immediately preceding the terminal date fixed for the application. The cards and money were collected by one person and the membership evidence is supported by a duly completed Form 80, Statutory Declaration Concerning Membership Documents, Construction Industry which attests to the regularity and sufficiency thereof. The form and content of the membership evidence are consistent with the requirements of section 1(1)(l) of the Act and establishes that the ten individuals on whose behalf membership evidence was filed are "members" of the applicant for purposes of the Act.

10. On the evidence before the Board, less than forty-five per cent of the employees in the bargaining unit, at the time the application was made, were members of the applicant on September 1, 1987, the terminal date fixed for the application and the date which the Board determines, under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act. Standing alone, the applicant's level of membership support among the bargaining unit employees would have resulted in a dismissal of this application. However, as previously noted, the applicant asserted that the respondent has contravened the Act in a manner such that the normal certification process does not permit the true wishes of the employees to be ascertained and requested that the Board certify it pursuant to section 8 of the Act.

11. Also filed with the Board in a timely manner was a statement of desire, or petition as such documents are more commonly known, in opposition to the application. This document contains twenty-six different signatures. Of these, five are the signatures of employees in the bargaining unit who had previously signed one of the membership documents filed by the applicant in support of its application. For oral reasons given at the hearing, the Board unanimously ruled that, in the circumstances of this case, the voluntariness of the petition was not relevant to its considerations with respect to the right of the applicant to be certified under section 8 of the Act and, accordingly, the Board did not conduct its usual inquiry into the voluntariness of the petition.

12. Subsequent to making this ruling, the Board found it necessary to clarify it and ruled that no party was precluded from leading evidence relating to the petition insofar as that evidence

was relevant to the allegations made by the applicant in support of its request for relief under section 8 of the Act, some of which relate specifically to the petition, or the Board's considerations with respect thereto. The mere fact that evidence is irrelevant for one purpose does not necessarily mean that it is irrelevant for all purposes.

13. In addition, neither the applicant nor the respondent wished to avail itself of the opportunity to proceed first. The applicant submitted that the nature of the allegations made brought the reverse onus provisions in section 89(5) of the Act into play, and, further, that the material facts were peculiarly within the knowledge of the respondent. Consequently, the applicant submitted that the respondent should proceed first. The respondent asserted that the majority of the allegations of impropriety made by the applicant had not been properly particularized, notwithstanding the respondent's request for particulars, and that those allegations should therefore be struck, or, in the alternative, the applicant should be made to proceed first. The applicant replied that the respondent's request for particulars had been properly answered. The objecting employees supported the respondent's position.

14. By majority decision (Board Member Montague dissenting), the Board ruled that, in the circumstances, it was, with one exception, satisfied that the allegations had been sufficiently particularized. That exception was paragraph 5 of Schedule C to the complaint as supplemented by letter dated October 9, 1987 wherein the applicant alleged that the respondent had threatened to curtail or cease its operations. The majority was not satisfied that the allegations were sufficiently particular with respect to: (a) the time, or the time frame, within which the alleged threats were made; (b) the persons to whom the impugned statements were alleged to have been made; (c) who was alleged to have made the threats; or (d) the specific places at which the impugned statements were allegedly made. Consequently, the majority ruled that, although it was not, in the circumstances, appropriate to strike the allegation, it was appropriate to require the applicant to proceed first.

15. In arriving at this conclusion, the majority considered the comments made at paragraphs 3, 4 and 5 in *Pebrá Peterborough Inc.*, [1987] OLRB Rep. Mar. 421 to be apposite:

3. Both Rule 72 of the Board's Rules of Procedure and Section 8 of the *Statutory Powers Procedure Act* require that particulars of allegations of misconduct be given in a timely manner to the party which is alleged to have acted improperly. This requirement is based on both legal and labour relations considerations. The legal consideration is a recognition of the rule of natural justice that a party against whom the allegations of wrongdoing are made must have sufficient notice of them to enable it to know and prepare for the case that it must meet. The labour relations consideration is that there be no prejudicial delay in the proceedings (see *Trigiani Contracting Ltd.*, [1979] OLRB Rep. Feb. 141). Where an allegation made in any document filed with the Board is not sufficiently particularized, the Board may, when requested, either strike out that allegation or direct that further particulars be provided. Further, evidence of facts or circumstances that have not been included or sufficiently particularized in a document filed with the Board may not be adduced at the hearing of the matter to which they relate except with consent of the Board and then only upon such terms as the Board considers appropriate.

4. On the other hand, the Board's approach to "pleading" is more lenient than that of the courts. Consequently, the Board will not usually strike out an allegation unless it is so lacking in particulars or so untimely that the party whose conduct is being complained of is so prejudiced that the allegation cannot properly be entertained in light of the legal and labour relations foundation for the requirement of particulars. In the Board's view it was not appropriate to strike out any of the allegations in the intervention or subsequent correspondence. However, we did agree that further particulars were required.

5. In considering the sufficiency of allegations, the Board considers whether or not they substantially identify the offences alleged and the act or omissions complained of; whether the informa-

tion requested is really required by the party requesting it; the knowledge or availability of knowledge possessed by the parties of the alleged improprieties; whether what is being requested is really evidence rather than particulars (though particulars may reveal evidence or names of witnesses); the apparent purpose for the demand for particulars; and, the general nature and circumstances of the improprieties alleged....

The majority also considered that, not only does onus not necessarily dictate the order of proceeding, but the onus in this consolidated proceeding is mixed. The Board has a discretion with respect to the order of proceeding in proceedings which include an application for certification and a complaint which triggers section 89(5) of the Act (see for example *Canadian Pizza Co. Ltd.*, [1983] OLRB Rep. June 872). The majority therefore considered it appropriate for the Board to exercise its discretion as aforesaid.

16. Section 8 of the *Labour Relations Act* provides an extraordinary means by which a trade union may be certified. Before the Board may exercise its discretion to certify under section 8, a trade union must establish three things:

- (a) that the employer has contravened the Act;
- (b) that the employer's contravention(s) is such that the true wishes of the employees are not likely to be ascertained;
- (c) that it has membership support adequate for collective bargaining.

Section 8 provides a remedy to be used only where a trade union is able to establish that there has been employer interference, intimidation, or coercion such that the membership evidence it has obtained does not, and a representation vote (if one was held) would not, reveal the true wishes of the employees with respect to the union's application for certification (see, *Ex-Cell-O Wilder, Canada*, [1977] OLRB Rep. June 370; *Winson Construction Ltd.*, [1976] OLRB Rep. Nov. 714 and [1977] OLRB Rep. Apr. 250; *Skyline Hotels Ltd.*, [1980] OLRB Rep. Dec. 1811).

17. The nature of the section 8 remedy is such that it is not possible to set down any catalogue of circumstances that will cause the Board to apply it. Rather, the Board must examine the cumulative impact of an employer's conduct in the context of all the circumstances in each case. In this case, the Board must first determine whether the respondent has breached sections 64, 66, and 70 of the Act as alleged by the applicant. In doing so, the Board must determine whether the respondent's stated reasons for acting as it did were the only reasons, or whether they were motivated, *in any way*, by anti-union considerations. It is not necessary that an improper motive be the sole, or even a major reason for the respondent's actions. It is sufficient if the improper motive formed a part of the basis for its actions (see *R. V. Bushnell Communications Ltd.*, (1973) 1 O.R. (2d) 442 (H.C.J.); affirmed at 4 O.R. (2d) 288 (C.A.); *Barrie Examiner*, [1975] OLRB Rep. Oct. 745; *DeVilbiss (Canada) Ltd.*, [1975] OLRB Rep. Sept. 678; *Halowell House Ltd.*, [1980] OLRB Rep. Jan. 35; *Westinghouse Canada Ltd.*, [1980] OLRB Rep. Apr. 577, affirmed at 86 CLLC ¶14,062 (Ont. Div. Ct.); *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755 among others).

18. The Board has often observed that an employer will seldom admit, in a contested proceeding, that it has acted in a manner contrary to the *Labour Relations Act*. In that regard, the Board in *M & K Plastics Limited* (Board File No. 2063-87-U, unreported decision dated February 29, 1988) observed that:

6. Since a case would not be litigated at all unless the employer denies any anti-union animus and proposes an alternative explanation for events, the question of motive becomes a key issue and the Board must generally rely upon circumstantial evidence and draw inferences about the employer's "real motivation" from all of the surrounding circumstances - not just the reason

articulated for the discharge. Even an ostensibly *bona fide* reason for the discharge may not always be a complete answer, if it is merely a pretext used to mask an illegal motive. In *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board put it this way:

In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

In *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, the Board also described the effect of the "reverse onus" provisions and stressed, once again, that a determination of the employer's motive must be made after an assessment of all of the circumstances surrounding the impugned conduct:

4. Section 79(4a) of The Labour Relations Act [now 89(5)] places the legal burden upon the employer in complaints such as the one before us, to satisfy the Board, on the balance of probabilities, that it has not violated the Act. In order for the Board to find that there has been no violation of the Act it must be satisfied that the employer's actions were not in any way motivated by anti union sentiment; the employer's actions must be devoid of "anti union animus". (See the *Bushnell* case (1973) 1 O.R. (2d) at page 442). The employer cannot engage in anti union activity under the guise of just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti union motive and which the evidence establishes to be the only reason for its conduct. (See *Barrie Examiner* [1975] OLRB Rep. Oct. 745 and *The Corporation of the City of London* [1976] OLRB Rep. Jan. 990).

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities...." These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The Labour Relations Act has been violated.

Finally, in *DeVilbiss (Canada) Ltd.*, [1975] OLRB Rep. Sept. 678, the Board listed a number of factors which can sometimes be helpful in determining whether a particular discharge was improperly motivated. That list includes the following observation:

The manner in which an employee is discharged may offer some clue as to the motive for the discharge. This does not mean that the Board determines whether the discharge is for just cause. Just as the existence of just cause does not offer a defence to employers, the lack of just cause does not establish a case for the employee. The issue is, in these cases, quite a different one - whether there exists any anti-union motive for the discharge. Anti-union motive, however, may be inferred from the manner in which an employee is discharged. If the manner in which the discharge occurs deviates from the normal pattern for such activity, then it is a possible inference that the deviation has some connection with the presence of union activity.

7. It is not a matter of this Board second guessing an employer's decision, or imposing its own notions of fairness upon the situation. Nor is it a question of whether a particular employer "likes unions" or is "anti-union" in some general sense. In our experience, most employers would prefer not to have to deal with a trade union, but that is not enough, in itself to establish an unfair labour practice. There must be a causal connection between "animus" and action; and if there is a credible explanation for the impugned employer decision, which is free from anti-union motive, then the Board has neither the right nor jurisdiction to intervene.

19. Accordingly, the Board must determine whether the respondent's actions herein, including the layoffs of the grievors, were in any way motivated by a desire to defeat the rights of its employees and the applicant under the *Labour Relations Act*, and, if so, whether the breaches are such that the true wishes of the employees can no longer be ascertained. In that regard, we observe that not every violation of the Act will create a situation where it is appropriate for the Board to certify a trade union under section 8. The breaches must be such that even the exercise of the Board's broad remedial authority under section 89 of the Act cannot create a situation where the true wishes of the employees will be ascertained.

20. The respondent denied that it acted in a manner contrary to the Act, either as alleged by the applicant, or at all. It submitted that it established that no part of the motivation or the layoffs complained of by the applicant was a desire to influence the bargaining unit employees with respect to the exercise of their rights under the Act but rather that the layoffs were for valid reasons in the ordinary course of business. Further, the respondent argued that the evidence does not establish that the respondent threatened to close down its business if a union was certified as the bargaining agent for its construction labourers, and that, in any event, the evidence taken as a whole does not justify the use of the extraordinary remedy in section 8 of the Act. In that respect, the respondent submitted that even if the Board found that the respondent violated the Act, the breaches could be remedied by the exercise of the Board's remedial authority under the Act, and that the Board could, and should, make the directions necessary to negate the effect of the breaches and direct the taking of a representation vote. The intervener's submissions substantially echoed those of the respondent. In addition, the employee objectors asserted that a corporation in the Province of Ontario is entitled to announce that it will close down if its employees unionize.

21. Upon considering the evidence before the Board, we are unable to accept the submissions of the respondent and the intervener. We find ourselves constrained to reject the testimony of Jack Sousa, the principal of the respondent, with respect to the reasons for the layoffs, and the denials of Jack Sousa and Maria Silva (daughter of Jack Sousa and the respondent's general manager) of the respondent's threats to close the company down if its employees unionized and of any knowledge that the applicant was trying to organize its employees prior to August 25, 1988. In coming to our conclusions and making our findings of fact, we have rejected as unreliable the testimony of Raul Silva (who, for reasons given orally at the hearing, the Board unanimously declined to declare a hostile witness as requested by the applicant whose witness he was), a bargaining unit employee, except with respect to his entreaty of the union that it tear up his application for membership. We also found that Raul Silva's demeanour on the witness stand was due partly to the nervousness that most witnesses feel, but mainly to his fear that he might be perceived by the respon-

dent, at least one representative of whom was present when he testified, as being a union supporter. In addition, we prefer the evidence of Mario Barbosa, another bargaining unit employee, where it conflicts with that of Jack Sousa as being more reliable in that his testimony was given more objectively and was more consistent with what we find was probable in the circumstances.

22. Finally, we note that our assessment of the reliability of Maria Silva's evidence was based in part upon a comparison between her oral evidence and the contents of a tape-recording made by George Oliveira of a conversation between them in the respondent's office on August 21, 1988. The Board unanimously dismissed (orally) the respondent's objection to the admission into evidence of that tape-recording.

23. In that regard, the Board considered that, except in limited circumstances which were not applicable, the Board does not have a discovery process in its proceedings. In the circumstances of this case, there was no obligation on the applicant to disclose any evidence, including the tape-recording, relevant to the proceedings, whether or not it intended to rely on it, prior to the hearing as the respondent complained it should have. In addition, applicant's counsel had put the statements he asserted were contained on the tape-recording to Maria Silva in an express and particularized way, although he did not first advise her of the existence of the tape-recording. In our view, the rule of fairness articulated in *Brown v. Dunn* (1893) 6 R. 67 (H of L) (adopted in *Peters v. Perras* (1909) 42 S.C.R. 244 (S.C.C.) and *United Cigars Stores Ltd., v. Buller* (1931) 66 O.L.R. 593 (Ont. C.A.) had been substantially complied with. Even though, on a strict construction, the applicant had breached the rule in *Brown v. Dunn* by not disclosing the existence of the tape-recording earlier, the tape-recording was still admissible. In determining the admissibility of evidence where the rule in *Brown v. Dunn* has been breached, one must consider all the circumstances, including the extent to which the rule has been breached, the reasons for the violation of the rule, the significance of the fact(s) in issue sought to be contradicted, and whether the rule has been violated by the party carrying the burden of proof (see *Machado v. Berlet et al* (1986) 15 C.P.C. (2d) 207 (Ont. H.C.); *Murray v. Woodstock General Hospital Trust et al.* (1988) O.J. 360).

24. In this case, the rule in *Brown v. Dunn* had been substantially adhered to, the facts in issue to which the tape-recording relates are central and not merely collateral, the respondent had, pursuant to section 89(5) of the Act, the burden of proof with respect to those facts, and, though it was no doubt intentional, the non-disclosure by the applicant was not inconsistent with current practice before the Board. Further, no other rule of fairness, natural justice, or evidence made this tape-recording inadmissible. A tape-recording, if proved, can be evidence (probably the best evidence) like any photograph, video tape, or other "document" within the meaning of the word in law (see for example Rule 30 of the Ontario Rules of Procedure). The Board also has the discretion, under section 103 of the Act, to determine its own procedure and to accept such evidence as it considers proper. Further, the respondent had the right to re-examine Maria Silva or to call evidence to explain the contents of the tape-recording, and the respondent's counsel could (and did) make adverse comment on the failure of the applicant to disclose the existence of the tape-recording earlier.

25. Mrs. Silva unequivocally denied making most of the statements attributed to her when they were put to her by the applicant's counsel. However, she identified the tape-recording and agreed that it was an accurate representation of the conversation she had with George Oliveira on August 21, 1988. There is no evidence to suggest that the tape-recording is anything less than accurate. This included the statements which she had previously denied.

26. Victor Claro, a full-time representative/organizer for the applicant, began to make inquiries for the purposes of attempting to organize the respondent's employees in early June 1987.

Because he was occupied with other matters, Claro spent relatively little time on the campaign which led to this application until late July, 1987. However, he did obtain information and the assistance of George Oliveira, a bargaining unit employee, who offered to help Claro by introducing him to other employees. Claro spent more time on the campaign in late July and August, 1987. By August 20, 1987, he had collected 9 applications for membership to add to the 1 he had obtained in June, 1987.. Until August 20, 1987, Claro was warmly received by the employees and was confident that the campaign would succeed. Then, on August 20, 1987, 5 employees (Manuel Almeida, Joe Coimbra, Victor Silva, George Oliveira and John Viera) were laid off, allegedly because of a shortage of work. The applicant's organizing campaign stopped cold.

27. The respondent carries on business in the construction industry in and around the Kingston area. The majority of its work is laying curbs and sidewalks, but it also does some residential and ICI construction. We accept that there is likely to be an ebb and flow in the amount of work in a company like the respondent which depends, to some extent, on the ability of other contractors to finish their work (and which must be completed before the respondent could do its). However, the evidence falls far short of establishing that there was a regular (or unusual) slow down at or about August 20, 1987 when the layoffs complained of herein occurred. Nor does it establish that those particular, or any, layoffs were justified.

28. There is no documentary or other cogent evidence before the Board to corroborate the bald, unparticularized assertions of Jack Sousa and Maria Silva that the layoffs were the result of a shortage of work that occurs regularly each August. It is difficult to believe, in the absence of cogent evidence, that a shortage of work as a result of "timing" problems between contractors would occur on such a regular basis during what is otherwise a busy time of the year in the construction industry. On the other hand, if such slow downs did occur so regularly, and therefore predictably, why were the laid off employees given no notice whatsoever of the impending layoffs prior to the very morning that they occurred?

29. In fact, the respondent's own evidence shows that the layoffs were not contemporaneous with the alleged work shortages and fails to establish any nexus between them. For example, Sousa testified that there was little or no work at its Shannonville project on August 14 to 20, 1987. The layoffs took place on August 20, 1987, the last day of the "shortage". A Peterborough project is said to have been slow for a month. However, the evidence clearly establishes that the respondent had a full crew working on that project by August 25, 1987, and indeed had been scheduled to do so. Consequently, we can only conclude that virtually the entire "slow" month Sousa referred to in his testimony preceded the layoffs. Similarly, the Bath Road (or Louis Bray) project was delayed from August 14 to August 24, 1987. Why wait until August 20, the Thursday before the Monday the work was to begin to lay employees off? A Brockville job stopped on August 16, 1987 "for a couple of days". How did that justify layoffs on August 20, 1987? There is no evidence whatsoever to establish a connection between the alleged work slow down on the Taylor-Kidd project and the layoffs.

30. What documentary evidence there is indicates that there was no significant difference between the total number of man hours worked by the respondent's construction employees before and after the layoffs. It also indicates that many individual employees worked more hours after the layoffs, which suggests that they were performing work which would otherwise have been done by the laid off employees.

31. Further, the respondent gave no indication to any of the laid off employees that they would be recalled at all, which is curious if they were caused by short term work shortages as a result of timing problems. Maria Silva also testified that it was administratively convenient to

impose the layoffs on August 20, 1987. What was convenient about it was left largely to Board's imagination and unless the layoffs were intended to be permanent, which could not be justified on any view of the evidence, we cannot imagine what was so convenient about it.

32. On the other hand, a number of employees, including Mario Barbosa, whom we found to be a very credible witness, testified that they observed no shortage of work at all. In that regard also, we reject Sousa's testimony and accept Barbosa's assertion that Sousa, on the very day of the layoffs, advised an unidentified party that the respondent could not begin some work in Prescott for Cornwall Gravel Co. Ltd. because of a shortage of men.

33. The evidence does suggest that there was some relationship between the seniority of employees and the employees whom the respondent chose to layoff. However, there is no satisfactory explanation why Domingos Cirne, Steve Stone, and Ian Lloyd, all of whom were more junior employees, were not laid off instead of George Oliveira. Further, it is clear that the respondent suspected that it was the least senior employees, who were mainly students, who were the primary target of applicant's organizing campaign, and that they would be the employees most likely to support it. Maria Silva's comment that it was "only a few students who want the collective agreement (that is, a union), the rest (of the employees) don't want it" is telling in that regard.

34. We are also satisfied that for several years it had been common knowledge among the employees that the respondent had threatened to close its business if it was "unionized". By itself, that threat seemed to have little impact on the employees. However, the layoffs made that threat real and immediate as evidenced by the reaction of employees, like Raul Silva, who had, prior to the layoffs, openly received the applicant's organizers, in contrast to the complete reversal of their attitude subsequent to the layoffs.

35. Nor does the fact some of the laid off employees were recalled to work alter the impact created in this case (see *Manor Cleaners Limited*, [1982] OLRB Dec. 1848). The layoffs, and the threat to close, had had their intended effect.

36. There is also the matter of the pension plan with respect to which the respondent called a meeting of bargaining unit employees, presided over by Maria Silva, in its offices on Saturday, August 22, 1987. While it may be that the question of a pension had been raised the year before, the Board was offered no satisfactory explanation for the almost unseemly haste with which the respondent acted on it in late August 1987, after doing very little to pursue the matter during the preceding year.

37. We are satisfied, having regard to all the evidence before us, including the timing of the layoffs, the timing of the pension plan meeting, Maria Silva's statements to George Oliveira on August 21, 1987, and Sousa's conversation with Barbosa on August 20, 1987, when he asked Barbosa if he had signed a union card, that the respondent became aware that the applicant was trying to organize its employees several days prior to August 20, 1987.

38. Finally, although the voluntariness of the petition filed in this matter is not, as such, before the Board, the evidence with respect to it was that a working foreman, and relative of Sousa, assisted in composing the Portuguese part of it (Portuguese being the first language of most of the employees), that Manuel Pinho asked for and received permission to circulate the petition on the respondent's job sites during working hours, and that the working foreman on each crew assisted Pinho in gathering the employees together at which time they were asked, in the presence of the working foreman, to sign it. Accordingly, the employees must have been left with the perception that the petition was management supported, and perhaps management inspired. It is

probable that such a petition would not be found to be voluntary (see *Burl-Oak Paving Ltd.*, [1987] OLRB Apr. 474).

39. Nothing in the *Labour Relations Act* requires any employer to want to deal with a trade union or to be neutral on the issue. Indeed, section 64 expressly recognizes an employer freedom of speech in that regard. However, no employer is entitled to use coercion, threats, promises, or undue influence in an attempt to compel its employees to exercise (or not to exercise) their rights under the Act in any particular way. The Board has long recognized that the relationship between employer and employee is a sensitive one in which, in the absence of an intervening bargaining agent for the employees, the balance of power is heavily weighted in favour of the employer. The vulnerability of employees is such that threats to their economic security by discharge, layoff, or threat to close the business, are among the most flagrant means by which an employer can intimidate or coerce them to not exercise their rights under the *Labour Relations Act*, and, concomitantly, to interfere in the selection, or formation of a trade union. Consequently, and the cases are legion in this regard, a suggestion by an employer that unionization would be accompanied by a loss of jobs will almost inevitably constitute a violation of sections 64, 66 and 70 of the Act.

40. In this case, we are satisfied that the respondent's actions constitute breaches of sections 64, 66, and 70 of the Act and we so declare. We are also satisfied that the breaches stopped the applicant's organizing campaign cold. The fact that the applicant's campaign lacked intensity prior to the layoffs does not detract from the fact that it had no chance of success at all afterwards. We are satisfied that the stalling of the campaign was a direct result of the respondent's illegal conduct and that the timing of the two was more than mere coincidence. This is not, in our view, a situation where the applicant's campaign can fairly be said to have simply "run out of steam".

41. In addition, assuming, without finding, that the Board has the jurisdiction to direct a taking of a representation vote after a hearing, in circumstances where the trade union has filed membership evidence on behalf of fewer than forty-five per cent of the employees in the bargaining unit, we find that this would not be an appropriate case in which to do so. The kind and degree of unlawful activity which we have found the respondent guilty of is such that it is highly improbable that any remedy which the Board could fashion would erase the normal concerns of reasonable employees for their economic well being sufficiently to enable them to express, and the Board to ascertain, their true wishes with respect to the application (other cases in which the Board has recognized this include *Winson Construction Ltd.*, *supra*, *G. T. Couriers (416656 Ontario Ltd.)*, [1979] OLRB Rep. Dec. 1167; *The Globe & Mail*, [1982] OLRB Rep. Feb. 189; *Di-Al Construction Limited*, [1983] OLRB Rep. Mar. 356; *Cambridge Canadian Foods Inc.*, [1987] OLRB Rep. Mar. 319; *Zenith Wood Turners Inc.*, [1987] OLRB Rep. Nov. 1443).

42. We are satisfied that the respondent's breaches of the *Labour Relations Act* in this case are such that the true wishes of the employees are not likely to be ascertained.

43. There is no Board decision of which we are aware in which a trade union which filed membership evidence with respect to more than thirty per cent of the employees in the bargaining unit has been held to have insufficient membership support for the purposes of collective bargaining. It is self-evident that what amount of membership support adequate will depend on the facts. There is no single, arbitrary level which will be appropriate in all cases (see *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562; *Skyline Hotels*, *supra*; *Manor Cleaners Limited*, *supra*; *Toronto Fabricating Co.*, [1985] OLRB Rep. Oct. 1528). In this case, there is little to indicate that the applicant's organizing campaign would not have succeeded in the absence of the respondent's improper conduct. The "chilling effect" of the respondent's conduct on the campaign was complete. The applicant's level of membership support is not low. With respect to the ICI sec-

tor of the construction industry, the Act operates to automatically bind an employer certified pursuant to an application under section 144(1) to the provincial agreement to which the applicant trade union is bound. Further, with respect to the non-ICI sectors of the construction industry, the Act provides, in section 40a, for the arbitration of first collective agreements in certain circumstances. In all the circumstances, we are satisfied that the applicant has membership support adequate for collective bargaining.

44. We are therefore satisfied that all three elements necessary for certification under section 8 have been established by the applicant. We are further satisfied that certification under section 8 in this application would be consistent with the legislative purpose of the provision (see *Manor Cleaners Limited, supra*, at paragraph 18). Accordingly, we find it appropriate to certify the applicant pursuant to section 8.

45. Section 144(2) of the Act, provides that, where the Board determines that a trade union is to be certified pursuant to an application under section 144(1), the Board shall issue one certificate confined to the ICI sector and another in relation to all of the sectors of the construction industry in the appropriate geographic area(s). Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

46. Further, pursuant to section 144(2) of the Act, a certificate shall issue to the applicant trade union in respect of all construction labourers employed by the respondent in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

47. Further, with respect to the applicant's violations of the Act as aforesaid, the Board directs, pursuant to section 89, that the respondent:

- (a) compensate Manuel Almeida, Joe Coimbra, Victor Silva, George Oliveira, and John Viera for their lost wages and benefits for the period of their layoff, together with interest calculated in accordance with Practice Note 13, as a result of the improper layoffs;
- (b) to sign and post one copy (in each of the English and Portuguese languages) of the attached notice marked "Appendix" in conspicuous places at each of its premises and job sites, and to keep such notices posted for 60 working days, and to take all reasonable steps to ensure that the notices are not altered, defaced or covered up.

48. The Board will remain seized of this matter with respect to the implementation of this decision, including the calculation of the amounts of compensation in paragraph 50(a) should there be any disagreement with respect thereto.

DECISION OF BOARD MEMBER JAMES A. RONSON; October 17, 1988

1. This application concerns the construction sector, an area of endeavour that is highly unionized in this Province. It was clear to me, from the evidence, that the employees involved by

this application had a thorough knowledge of the pros and cons of union membership and its effect on both their employer's ability to obtain contracts and on their ability to find suitable employment.

2. The union began an organizing campaign which ground to a quick and dismal halt long before the facts arose which form the basis for the alleged unfair labour practices.

3. By reason of lack of work, the employer laid-off certain employees on the basis of seniority. The union seized this opportunity to create and collect evidence that would support an application under section 8 of the Act. What it could not obtain from the employees, it would seek to obtain from the Board.

4. Simply, the union has not shown that it has the support of enough employees to justify the imposition of the extraordinary remedies found in section 8. The converse is true; - the employees indicated their level of support long before the shenanigans began.

5. There is only one way to clear the air in a situation like this and get everything back on track. I would order a vote, as is contemplated by the Act, and let the people involved make the decision.

DECISION OF BOARD MEMBER RENE R. MONTAGUE; October 17, 1988

1. In this case the applicant union alleges that five employees of the respondent have been laid-off on account of their lawful affair of the complainant contrary to sections 64, 66 and 70 of the Act, as well as other allegations. One of the other allegations were not in the respondent's submission particularized enough, and requested the applicant by letter dated September 14, 1987 requesting additional particulars which was done on October 9, 1987. Counsel for the respondent did not raise that the particulars received were comprehensive enough until the 2nd day of hearing (albeit before any evidence was heard).

2. As a result I would have concluded and directed that respondent employer to proceed first in this matter, even if it would have meant adjourning until the additional particulars requested had been submitted, and I would have *not* directed that the applicant proceed first in these circumstances of this case.

Appendix
Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE COMPANY AND THE UNION PARTICIPATED AND HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT THE COMPANY VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM YOU OF YOUR RIGHTS AND OBLIGATIONS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT DISCHARGE OR THREATEN TO DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHY.

WE WILL NOT CEASE, CURTAIL OR CLOSE DOWN THE COMPANY'S BUSINESS OR OPERATIONS BECAUSE OF THE PRESENCE OF THE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL OR ANY OF ITS AFFILIATED BARGAINING AGENTS.

WE WILL NOT IN ANY MANNER INTERFERE WITH OR RESTRAIN OR COERCE EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH THE DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL NOT INTERFERE WITH THE REPRESENTATION OF OUR EMPLOYEES BY THE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL OR ANY OF ITS AFFILIATED BARGAINING AGENTS.

WE WILL PAY COMPENSATION TO MANUEL ALMEIDA, JOE COIMBRA, VICTOR SILVA, GEORGE OLIVEIRA AND JOHN VIERA FOR WAGES AND BENEFITS THEY LOST AS A RESULT OF THE IMPROPER LAYOFFS IN AUGUST, 1987.

J. SOUSA CONTRACTOR LIMITED

PER: _____
JACK SOUSA

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 17TH day of OCTOBER

19 88

2153-87-R National Capital Roadbuilders Association, Applicant v. Labourers International Union of North America, Local 527, Respondent v. Pipe Line Contractors Association of Canada, Intervener #1 v. Ottawa Construction Association, Intervener #2 v. The Utility Contractors' Association of Ontario Incorporated, Intervener #3 v. Labourers' International Union of North America, Ontario Provincial District Council, Intervener #4

Accreditation - Practice and Procedure - Whether Board should continue its practice of compiling a list of employers referred to in accreditation decisions as Final Schedule F - Final Schedule F consists of those employers who have not employed any of the represented employees within the year prior to the date of making the application - Board not compiling Final Schedule F - Board issuing accreditation certificate to applicant for all employees of construction labourers employed in the roads, sewers and watermains, and heavy engineering sectors in Board area 15

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *J. Trim* and *C. A. Ballentine*.

APPEARANCES: *Walter Langley* and *William Scott* for the applicant; *S.B.D. Wahl* and *N. Scipioni* for the respondent; *Carl W. Peterson* for intervener #1, Mastercraft Bridge & Engineering Construction (Ottawa) Ltd. and Spie Construction Inc.; *Joe Liberman* and *Fred Connolly* for intervener #3; *Joe Liberman* for intervener #2, Sarnia Construction Association and its members, Ontario Precast Concrete Manufacturers Association and its members, Canadian Dredge and Dock Company, Milne and Nichols Ltd., Pigott Construction Ltd., Greenspoon Brothers Ltd., Alnor Earthmoving Ltd., Moffat Construction Inc., Bot Construction, Todglen Construction, Con-Eng Contractors Inc. and O. J. Gaffney; *David Strang* for intervener #4; *Daniel Fryzuk* for Armbr Materials & Construction Ltd.; *Werner O. Schmidt* for Blier Inc.; *Richard J. Nixon* for Paul Daoust Construction Ltd.; *Walter Pashnicki* for Permanent Concrete; *Robin B. Cumine* for Steinberg Inc. and The Ontario Erectors Association.

DECISION OF THE BOARD; October 6, 1988

1. The Board issued a decision dated June 28, 1988, in this application for accreditation in which it found that the applicant had satisfied all of the requirements of section 127 of the *Labour Relations Act* and is in the position to be accredited as the exclusive bargaining agent for employers of construction labourers employed in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell represented by the respondent Labourers International Union of North America, Local 527 ("Local 527"). The Board did not accredit the applicant, however, because of an outstanding issue. The issue, as it was stated to the Board, is whether the Board, in the process of disposing of applications for accreditation, is required to continue or should continue the practice of compiling a list of employers referred to in accreditation decisions issued by the Board as Final Schedule "F". The employers who are named on that list are those employers for whose employees the trade union respondent to the application has been found to hold bargaining rights covering the relevant geographic area and sector or sectors of the construction industry, but who have not employed any of the represented employees within the year prior to the date of making of the application. For reasons which will be explained later in the decision, however, neither the number of employers on this list nor their identity is a factor in the Board's determination of whether an applicant should be accredited, in the words of subsection 127(2). "... as the bargaining agent of the employers in the unit of employers". Therefore, the issue for the Board in the instant application is more correctly stated as whether the Board is required to or

should determine the number and identity of those employers for whose construction labourers Local 527 held bargaining rights in the geographic area and sectors of the construction industry described above as at the date of making of the application, but who have not had construction labourers in their employ in that area and those sectors within one year prior to that date. Those employers would be in the unit of employers but would not be part of the count of employers for purposes of deciding whether the applicant herein should be accredited. The applicant, if accredited, would be the exclusive bargaining agent of *all* employers in the unit of employers, including those who were not part of the count of employers. Reference is made to the issue at paragraphs 4 and 5 of the June 28th decision.

2. The same issue is present in companion applications for accreditation by this applicant in Board File No. 2263-86-R. In that file, the Board has found the applicant to be in a position to be accredited for two units of employers for the same sectors and geographic area as this application. The units were with respect to all employers of truck drivers for whom the International Brotherhood of Teamsters Union, Local 91 has bargaining rights and all employers of employees engaged in operating and maintaining of heavy construction equipment for whom the International Union of Operating Engineers, Local 793, has bargaining rights, in those sectors and that geographic area. Certificates of accreditation and accreditation orders were not issued for those units either because of the Final Schedule "F" issue. The applications also involved a common issue of whether certain collective agreements on which Local 527 and Local 793 were relying created bargaining rights in the sectors and geographic area by which the unit of employers has been described. The files were listed for hearing together on these issues. Notices of hearing were given to all employers and other interested parties that the Board would be receiving evidence and representations respecting those issues in both applications. For reasons given later in the decision, the Board did not receive the submissions on the bargaining rights issue, but it did receive their submissions on the Final Schedule "F" issue and reserved its decision.

3. The respondent trade unions in the two files are represented by the same counsel. He had raised the issues in both files in the following terms:

...lengthy proceedings in order to compile an exhaustive Schedule "F" may be required in light of the Board's determinations in *Valentine Enterprises Contracting* and *John Hayman & Sons Limited*. It is the submission of the Respondents that the Board, in issuing a Certificate of Accreditation with [respect] to the appropriate bargaining unit need not list the contractors bound by the Accreditation Certificate. There is no requirement in the Act or the Rules of Procedure that requires a listing of the employers bound under the resultant certificate. In effect it is the submission of the Respondents that the Board ought not engage in lengthy and expensive hearings with respect to the existence of bargaining rights in the affected sectors of the construction industry relating to particular contractors who deny the existence of such bargaining rights. It is sufficient that the Accreditation Certificate be expressed in terms of,

... All employers for whom the [union] holds bargaining rights as of [the date of application] and for such other employers for whose employees the trade union may obtain bargaining rights through certification or voluntary recognition thereafter.

This would obviate the necessity of conducting hearings to determine the inclusion of any particular contractor on Schedule "F". The determination of

these individual issues relating to particular contractors would be left to circumstances in which a denial of bargaining rights arises in a subsequent litigation context between the parties. Accordingly should our representations be endorsed by the Board the lengthy hearing process with respect to Schedule “F” would not be required.

Further, it is respectfully submitted that the Notice to Employers of this Application for Accreditation ought to specifically draw the attention of the Employer to this issue and specifically state that in the absence of a reply that specifically addresses the matter and/or in the absence of filing any reply at all, the Board may determine to proceed with this application and not conduct any hearings as to the existence of bargaining rights affecting the Employer which will be an issue left to arise in the course of subsequent litigation between the parties.

4. Local 527 claims that its bargaining rights for employees in the sectors and geographic area found by the Board to be appropriate for the application are not limited to those contained in the collective agreement between the applicant and an uncertified council of trade unions representing Local 527 and the two respondent trade unions in the other file (hereafter referred to as “the Agreement”), or any agreements signed with individual employers which pick up the Agreement. Local 527 claims bargaining rights for employees in those sectors and that geographic area under each of the following collective agreements to which it is either a party or by which it is bound:

- (1) The Labourers Provincial Agreement for the industrial, commercial and institutional sector;
- (2) The Utility Contractors’ Association Ontario Provincial Agreement;
- (3) The Labourers Mainline Pipeline Agreement of Canada;
- (4) The Labourers Distribution Pipeline Agreement for Canada; and
- (5) The Civil Engineering Provincial Agreement.

Its claim is based on the proposition that the scope clauses in those agreements include the relevant sectors and geographic area, or they contain “cross-over” clauses which have the effect of extending the bargaining rights of the union parties to those five agreements to include the bargaining rights in the Agreement. Local 527 contends, therefore, that employers who are bound to those agreements would be bound also by any accreditation certificate which issues to the applicant in this matter.

5. When these issues came before the Board for hearing, the employers and other parties who were present or represented at the hearing arrived at an agreement that the Board set aside the bargaining rights issue until it decides the issue of Final Schedule “F”. They also agreed that, should the Board decide not to compile a Final Schedule “F” and in the event of a claim in a future proceeding before the Board by Local 527 that it held bargaining rights in the relevant sectors and geographic area under one of the aforesaid collective agreements, Local 527 would have to fulfill specific notice obligations and waive any claim to damages in the first claim against each employer. The text of their agreement on the notice and damage waiver requirements reads as follows:

The Respondents, International Union of Operating Engineers, Local 793, Labourers International Union of North America, Local 527, International Brotherhood of Teamsters, Local 91

hereby agree that should an Accreditation Order issue and should there be a finding by the Ontario Labour Relations Board that a final Schedule "F" is not to be compiled in the Applications for Accreditation by the National Capital Road Builders Association, then in any situation in which the Respondents or any of them are asserting that an Employer is bound by the Accreditation Order, notice must and shall be given to the Association(s) and the Employer being party to the Collective Agreement under which the Respondents or any of them are alleging bargaining rights.

In addition, only in any cases of first instance involving the issue of the existence of bargaining rights forming the basis for the application of the Accreditation Order, relative to each Association(s) and/or the Employer Collective Agreement, no liability in the form of damages shall be claimed or found provided that essentially the same issues have not been argued and decided before the Ontario Labour Relations Board between the Respondent trade unions on the one hand and either of the Employer Association or the Employer on the other.

6. The Board proceeded in the hearing in accordance with their agreement and received their submissions on the Final Schedule "F" issue. Those submissions are set out below:

Submissions for the Respondent

(1) The Act is drafted to bind employers for whose employees a respondent trade union holds bargaining rights, as at the date of making of an application for accreditation, in the sector or sectors and geographic area found by the Board to be appropriate, or employers for whose employees the trade union acquires such bargaining rights after the application date and after the accreditation certificate has issued.

(2) Since the Final Schedule "F" is prepared to reflect the bargaining rights held as at the date of application, no matter when the schedule is compiled, it is incomplete at the time of issue as to the contractors who would be bound by the order because it would not contain the names of any contractors for whose employees the respondent trade union acquired bargaining rights after the date of application and before the date when the accreditation certificate issues.

(3) The problem which the Final Schedule "F" represents for a trade union respondent to an application for accreditation arises out of the Board's determinations in its *Valentine Enterprises Contracting and John Hayman & Sons Limited* decisions. Those decisions read together stand for the proposition that a trade union cannot rely on bargaining rights obtained prior to the application date in a proceeding after the application date unless the employer's name is listed on the Final Schedule "F". That circumstance requires a trade union, when replying to an application for accreditation, to assert all possible bargaining rights or be considered to have abandoned them. The bargaining rights claims of the trade union must be resolved before the Final Schedule "F" can be compiled and the accreditation certificate and order issued. All of which leads to delays in disposing of the application and proceedings which are time consuming and costly to the parties and wasteful of the Board's time and resources.

(4) Nothing in the Act or the Board's Rules of Procedure requires that a Final Schedule "F" be compiled. It is used by the Board as an administrative aid for separating those employers who affect the determinations under section 127 of the Act from those who do not, but who would be bound by an accreditation certificate and order. The schedule has nothing to do with whether a certificate and order should issue. That being the case, the question of which employers, other than those who affect the count under section 127, who would be bound by the certificate and order, should be left for a decision whenever the question arises in a particular case. That was the principle expressed by the Board in the context of an application for certification in *Robin Hood Multifoods Inc.*, [1985] OLRB Rep. July 1159, at paragraphs 11 and 12, in a situation analogous to delaying the issuing of an accreditation certificate until the Final Schedule "F" is compiled.

11. *We are satisfied that where, as here, the description of the appropriate bargaining unit has been settled and the Board can say with certainty that more than 55 per cent of the employees in that unit on the application date were members of the applicant at the relevant time, the Board does have the jurisdiction to grant the applicant a final certi-*

cate, notwithstanding the existence of questions which could be dealt with in an application under subsection 106(2). Although the parties to this application agreed to attempt settlement of those questions before asking the Board to answer them, their agreement played no part in our conclusion on the jurisdictional question. The Board would have jurisdiction to grant a final certificate in these circumstances even if there were no such agreement.

12. There was no suggestion in this case that the bargaining unit description would be affected by a determination of the employee status of the disputed individuals. We need not deal here with the question whether and to what extent the Board must or ought to continue to resolve questions of the application of subsection 1(3)(b) in the fine tuning of a bargaining-unit description when those questions do not otherwise affect the result.

[emphasis added]

Since the Final Schedule “F” has nothing to do with whether an applicant should be accredited, it may be academic until a specific issue arises respecting whether a particular employer is bound to the accreditation certificate and order because, at the time the application was made, the respondent trade union held bargaining rights for the employees of that employer. The Board should be reticent to deal with what may be an academic issue in matters involving the acquisition or termination of bargaining rights which should be dealt with expeditiously. The Board should deal with real and focused issues.

(5) If the Board continues to compile a Final Schedule “F” in each application for accreditation, the very length of those proceedings may prove so burdensome on applicants that they will not proceed with their applications even though they are in a position to be accredited. That development would have the effect of writing the accreditation provisions out of the Act and would deprive employers of a means of balancing their bargaining power with that of trade unions.

(6) The interests of parties and employers potentially affected by an application for accreditation can be protected in two ways. First, the notice to employers of an application for accreditation could be used as a means of drawing their attention specifically to the bargaining rights issue and of stating that, in the absence of a reply which expressly addressed the issue and/or in the absence of any reply at all, the Board may determine to proceed with the application and not decide the bargaining rights issue affecting the employer. That would leave the issue to arise in the course of subsequent litigation between the parties and be decided then. Second, the accreditation certificate and order could express that it will be binding on all employers for whom the respondent trade union holds bargaining rights as of the date of application and for such other employers for whose employees the trade union may obtain bargaining rights thereafter by certification or voluntary recognition.

(7) Since a Final Schedule “F” is not required by the Act or the Board’s Rules of Procedure, the decision of whether the Board should continue to compile a schedule is a procedural one and falls squarely within the Board’s discretion under subsection 102(13) of the Act.

Submissions for the Applicant

Applicant counsel endorsed and adopted the submissions of counsel for the respondent and added that the extensive proceedings which would be required to resolve a Final Schedule “F” for each of its applications would make the proceedings too costly for the applicant to continue with the applications and that would defeat the purposes of the accreditation provisions of the Act.

Submissions of the Other Parties

Mr. Liberman, on behalf of interveners #2 and #3 and his employer clients, neither supports nor contests the position taken by counsel for the respondent, but, if the Board decides not to compile a Final Schedule “F” in these applications, he contends that the Board must include in its decision the agreement reached by the parties for their protection against damages in the first instance that an employer is unsuccessful in contesting a claim that the respondent holds bar-

gaining rights for employees of the employer in the relevant sectors and geographic area. The submissions of the other parties which supported the position taken by counsel for the respondent, also included the following:

(1) When the Minister first issued employer designations respecting province-wide bargaining, there was a purposeful decision at the time the designation order issued not to attempt to compile an exhaustive list of the employers covered by each order at the time of issue because of the immensely difficult administrative task of compiling the list. In the instant case, the Board would be dealing with five collective agreements involving multiple parties and individual employers. Therefore, it would be an extremely difficult and time consuming task to determine whether those agreements establish the bargaining rights asserted by the respondent trade unions.

(2) There is reasonable ground for apprehension that good collective bargaining relationships could be jeopardized by forcing parties who are bound to one of the asserted collective agreements to litigate what amounts to an academic or theoretical issue of whether the collective agreement establishes bargaining rights in a sector or sectors where the employer has not had employees in those sectors in the past and is not likely to have them in the future.

7. The sections of the Act relevant to the issue are:

125. Where a trade union or council of trade unions has been certified or has been granted voluntary recognition under section 16 as the bargaining agent for a unit of employees of more than one employer in the construction industry or where a trade union or council of trade unions has entered into collective agreements with more than one employer covering a unit of employees in the construction industry, an employers' organization may apply to the Board to be accredited as the bargaining agent for all employers in a particular sector of the industry and in the geographic area described in the said certificates, voluntary recognition documents or collective agreements, as the case may be.

126.-(1) Upon an application for accreditation, the Board shall determine the unit of employers that is appropriate for collective bargaining in a particular geographic area and sector, but the Board need not confine the unit to one geographic area or sector but may, if it considers it advisable, combine areas or sectors or both or parts thereof.

(2) The unit of employers shall comprise all employers as defined in clause 117(c) in the geographic area and sector determined by the Board to be appropriate.

127.-(1) Upon an application for accreditation, the Board shall ascertain,

- (a) the number of employers in the unit of employers on the date of the making of the application who have within one year prior to such date had employees in their employ for whom the trade union or council of trade unions has bargaining rights in the geographic area and sector determined by the Board to be appropriate;
- (b) the number of employers in clause (a) represented by the employers' organization on the date of the making of the application; and
- (c) the number of employees of employers in clause (a) on the payroll of each such employer for the weekly payroll period immediately preceding the date of the application or if, in the opinion of the Board, such payroll period is unsatisfactory for any one or more of the employers in clause (a), such other weekly payroll period for any one or more of the said employers as the Board considers advisable.

(2) If the Board is satisfied,

- (a) that a majority of the employers in clause (1)(a) is represented by the employers' organization; and

- (b) that such majority of employers employed a majority of the employees in clause (1)(c),

the Board, subject to subsection (3), shall accredit the employers' organization as the bargaining agent of the employers in the unit of employers and for such other employers for whose employees the trade union or council of trade unions may, after the date of the making of the application, obtain bargaining rights through certification or voluntary recognition in the appropriate geographic area and sector.

(3) Before accrediting an employers' organization under subsection (2), the Board shall satisfy itself that the employers' organization is a properly constituted organization and that each of the employers whom it represents has vested appropriate authority in the organization to enable it to discharge the responsibilities of an accredited bargaining agent.

8. In order to put the issue described at paragraph 1 in its proper context, it is useful to describe some of the consequences of a successful application for accreditation. For an application to be successful, the Board has to be satisfied that the applicant employers' organization has met the double majority representation standard set by subsection 127(2) of the Act. That is, the Board must be satisfied that the employers' organization represents a majority of the employers in the unit of employers found by the Board to be appropriate for collective bargaining who:

- (1) within one year prior to the date of making of the application, had in their employ employees for whom the trade union respondent to the application has the requisite bargaining rights in the geographic area and sector determined by the Board to be appropriate; and
- (2) such majority of employers employed a majority of the employees in the employ of the employers in (1) during the weekly payroll period immediately preceding the date of the application.

When the Board is so satisfied, it accredits the employers' organization as the bargaining agent of all employers for whose employees the trade union held the requisite bargaining rights as at the date of making of the application, whether or not those employers employed any of those employees within one year prior to the application date, and for all employers for whose employees the trade union later acquires the requisite bargaining rights. Those bargaining rights are exclusive; employers bound by an accreditation certificate are prohibited from bargaining individually with the trade union [section 131]. The employers' organization acquires the rights, duties and obligations under the Act of the employers for whom it becomes bargaining agent [section 128(1)]. Any employer for whose employees the trade union held the requisite bargaining rights as at the date of making of the application ceases to be bound by any collective agreement with the union on its expiry date and becomes bound by the collective agreement then in effect between the union and the employers' organization, or any agreement into which they subsequently enter [subsections 2, 3, 5, and 6 of section 128]. Any employer for whose employees the trade union obtains bargaining rights after the date of making of the application, becomes bound by the collective agreement between the union and the employers' organization in effect at the time the union acquires its rights, or is subsequently entered into them by [subsection 128(5)].

9. From the foregoing, it is abundantly clear that, when an application for accreditation is made, the rights of employers, amongst others, may be directly affected by the application. The rules of natural justice and the *Statutory Powers Procedure Act* require that all those whose rights may be directly affected by the proceedings be given notice of them. Therefore, all employers who may fall within the bargaining unit described in the application are entitled to notice of it. The Board's Rules of Procedure require the Registrar, amongst other things, to serve the respondent trade union with a copy of the application and a "Notice of Application for Accreditation Con-

struction Industry” [subsection 103(2) and Form 87]; to serve any employers’ organization, trade union or council of trade unions named in the application or reply as claiming or known to him as claiming to have an interest in the application, with notice of it [section 106]; and, to serve such employers as may be directed by the Board with a “Notice to Employers of Application for Accreditation, and of Hearing, Construction Industry” [section 110 and Form 93]. These rules obviously are intended to comply with the notice requirements of the rules of natural justice and the *Statutory Powers Procedure Act*. The notice in Form 87 requires the respondent trade union to file with the Board lists of employers in the form of the schedules attached to the notice. These schedules include Schedules “E” and “F”. Schedule “F” is a list of all employers for whose employees the respondent trade union claims bargaining rights in the relevant sectors and geographic area, but who the union claims have not employed such represented employees in those sectors and area within the year prior to the application date. Schedule “E” is a list of all employers for whose employees the respondent trade union claims bargaining rights in the relevant sectors and area, excluding those on Schedule “F”. Therefore, by exception, Schedule “E” is a list of all employers for whose employees the respondent trade union claims bargaining rights in the relevant sectors and geographic area who had employed such represented employees in the relevant sectors and geographic area within the year prior to the application date.

10. It was clearly intended that Schedules “E” and “F” together comprise an exhaustive list of all employers for whose employees the union claims to hold the requisite bargaining rights. If their claim proves to be true, as at the time the application was made, they also would be the employers in the unit of employers found by the Board to be appropriate for collective bargaining. Therefore, it follows that the two schedules are intended to be an exhaustive list of all employers whom the trade union claims to be in the unit of employers regardless whether the employers had in their employ in the relevant period any employees represented by the trade union. Hereafter in this decision, whenever it refers to Schedules “E” and “F”, the decision will be referring to the lists of employers claimed by the trade union to be in the unit of employers as the lists exist prior to the Board making its final determination of the number of employers on them. Schedules “E” and “F” serve a dual purpose. First, they are the principal source of the names of employers to whom the Board directs notice be given in Form 93 pursuant to section 110 of its Rules. Second, they serve as the respondent union’s pleadings respecting two matters: the identity of the employers for whose employees it claims to hold the requisite bargaining rights and, which of those employers has such employees in their employ within one year prior to the application date. The union’s assertions in both matters are generally accepted unless specifically challenged by a party. Once the Board has made that final determination, it has designated the lists Final Schedule “E” and Final Schedule “F”. A Final Schedule “E” lists the names of those employers found by the Board to be in the unit of employers and to have had in their employ within one year prior to the application date employees for whom the trade union holds the requisite bargaining rights. The number of employers on that list comprises the number of employers to be ascertained by the Board under clause (a) of subsection 127(1) of the Act. They are the number of employers who are included for purposes of the count of employers in that clause. In turn, it is in respect of those employers that the Board determines the number of employers who were represented by the employers’ organization on the date of making of the application [clause (b) of subsection 127(1)] and the number of employees on the payroll of each of the subsection 127(1)(a) employers for the payroll period immediately preceding the date of the application [clause (c) of subsection 127(1)]. Since the numbers ascertained by the Board pursuant to clauses (a), (b) and (c) of subsection 127(1) are the numbers by which the Board satisfies itself whether the double majority requirements of subsection 127(2) have been met, it is evident that a Final Schedule “E” lists all of the employers who have been found by the Board to be in the unit of employers and part of the count of employers for purposes of subsections 127(1) and (2) of the Act. A Final Schedule “F” lists the names of those employers who were found by the Board to be in the unit of employers, but were *not* to be

included in the count of employers because they were found *not* to have had in their employ within one year prior to the application date employees for whom the trade union holds the requisite bargaining rights. In other words, a Final Schedule “F” lists all employers who would be included in the unit but *not* in the number of employers ascertained by the Board under clause (a) of subsection 127(1). Therefore, use of the terms Final Schedule “E” and Final Schedule “F” is a shorthand way of referring to those employers who are in the unit of employers and either are (Final Schedule “E”) or are *not* (Final Schedule “F”) part of the count of employers for the purpose of deciding the double majority questions posed by subsection 127(2) of the Act. When they are used hereafter in this decision, they bear that meaning.

11. Having regard to the first purpose served by Schedules “E” and “F”, when a respondent trade union receives the Board’s notice of an application for accreditation, clearly it must turn its mind to the task of identifying the employers for whose employees it claims to hold the requisite bargaining rights. It also must list on the appropriate schedules the names of those employers whom it identifies and file the schedules with the Board. The rules of natural justice and the *Statutory Powers Procedure Act*, for the purpose of giving notice, require that Schedules “E” and “F” together exhaustively list all those employers whom the trade union claims are in the unit of employers as at the date of making of the application, regardless whether the employers had in their employ at the relevant times employees represented by the trade union. For the purpose of giving notice, then, it is irrelevant whether the employers claimed by the union to be in the unit of employers employed represented employees in the relevant period. If the respondent trade union is not diligent in turning its mind to its bargaining rights, an employer may not receive notice that its legal rights could be affected by the application. That could result in placing the trade union at risk if, on a subsequent occasion, it seeks to rely on its bargaining rights for the employees of that employer.

12. In that respect, Local 527 has claimed bargaining rights for the employees of, and the Board sent notices in Form 93 to, 266 employers as follows:

Employer

No. Name

- 1 Asplundh Brush Control
- 2 Beaver Asphalt Paving Company Limited
- 3 Beaver Construction Group Limited, Beaver
Construction Ontario Division
- 4 Beaver Underground Limited
- 5 Besharah Construction, Division of Beshara Dev.
- 6 Bob Henricksen Construction
- 7 Deschenes Structures (Eastern) Inc.
- 8 Dibblee Construction Limited
- 9 Dineen Construction Ltd.
- 10 Dufresne Piling Co. (1967) Ltd.
- 11 Central Paving Reg’d 388685 Ontario Limited
- 12 Choctaw Const. Co. Ltd.
- 13 Econo Excavating & Paving
- 14 Fix Fast Limited
- 15 Francon-Ottawa, Division of Lafarge Canada Inc.
- 16 Gary Oswald Blasting Inc.
- 17 Geodex Foundation Inc.
- 18 Loretta Paving Company Limited
- 19 H. J. MacFarland Construction
- 20 L. J. Dery Construction

- 21 S. McNally & Sons Ltd.
- 22 Miwel Construction Ltd.
- 23 O'Leary's Limited
- 24 (Duplicate of Number 144)
- 25 J. E. Construction Inc.
- 26 Petrifond Foundation Co.
- 27 Pitts Engineering
- 28 (Duplicate of Number 170)
- 29 Schwenger Construction Ltd.
- 30 Art Spino Enterprises Inc.
- 31 Spino Construction Co. Ltd.
- 32 Taggart Construction Limited
- 33 Torus Construction Ltd.
- 34 W. D. LaFlamme Ltd.
- 35 S. W. Farrell & Sons (1979) Ltd.
- 36 V. K. Mason Construction
- 37 Underground Services Ltd.
- 38 Vallance & Levy Eng. Contractors Ltd.
- 39 Beaver Pipeline Construction
- 40 Bradley Kelly Construction Ltd.
- 41 Denis Brisbois Contractor Ltd.
- 42 Enercom Construction Inc.
- 43 G. M. Gest (1977) Inc.
- 44 Lundrigans Construction Limited
- 45 M. V. Mark Inc.
- 46 Robert B. Somerville Co.
- 47 Armbro Materials & Construction Ltd.
- 48 A & G D'Angelo Drywall Ltd.
- 49 Soudure Gen. A. Cyr Enr.
- 50 A.R.T. Tile & Marble Co.
- 51 Alexandria Builder's Sup.
- 52 Aluminium Alabrie
- 53 Amentea Masonry Contr. (133 Spadina)
- 54 Amentea Masonry Contr. (108 Lerretton)
- 55 Anchor Shoring Ltd.
- 56 T. A. Andre and Sons (Ontario) Limited
- 57 Anthes Equipment Ltd.
- 58 Joe Arban Contract Ltd.
- 59 (Number Not Used)
- 60 Arnprior Builders Supplies
- 61 Asbestos Erectors
- 62 B. Atkinson Const. Ltd.
- 63 B.D.L. Contractors Ltd.
- 64 B.I.P. Construction Ltd.
- 65 M. Baker Trucking T. Baker
- 66 Banchini Limited
- 67 Canadian BBR (1980) Inc.
- 68 Bectar Corporation
- 69 Begg & Daigle Store & Office Interiors
- 70 Bellai Brothers Ltd.
- 71 R. J. Bender Cosntruction Ltd.

- 72 Bot Construction Ltd.
- 73 Brikon Mansonry Inc.
- 74 Brilok Construction (1985) Limited
- 75 (Duplicates Number 41)
- 76 ED. Brunet & Fils Ltee
- 77 Bulward Const. Ltd.
- 78 Concrete Column Clamps (C.C.C.) Ltd.
- 79 Cardinal Refractories Inc.
- 80 Cem-Al Spray Limited
- 81 The Cementation Company (Canada) Limited
- 82 Central Precast Products
- 83 Century Manor
- 84 Chateau Guay Insulation
- 85 V. J. Cianci Enterprises
- 86 Claus Arp Masonry
- 87 Clifford Masonry Limited
- 88 Colibri Construction Inc.
- 89 Comstock International Ltd.
- 90 R. L. Coolsaet of Can. Ltd.
- 91 Cornwall & Dist. Con. Ltd.
- 92 Cornwall Gravel Co. Ltd.
- 93 Cos-Bar Ltd.
- 94 Cote & Ryde Construction Ltd.
- 95 Creston Forming Ltd.
- 96 D'angelo Plastering
- 97 D. F. Forming Ottawa Ltd.
- 98 D.M.A. Masonry Limited
- 99 Dalacoustic Contractors Ltd.
- 100 Dalton FNG. & Const. Ltd.
- 101 P. J. Daly Contracting Ltd.
- 102 Paul Daoust Construction Ltd.
- 103 Dakrow Developments Ltd.
- 104 De Marinis (DMA) Incorporated
- 105 Deep Foundations Contr.
- 106 Delta Tile & Terrazzo Co. Limited
- 107 D. J. Dery Construction
- 108 Dibco Underground Limited
- 109 Dinacon Construction Ltd.
- 110 Donalco Services Ltd.
- 111 Dufferin Construction Co.
- 112 Dulepka Equipment Rentals
- 113 Dumoulin and Associates Reparations de Beton Limitee
- 114 Duntri Construction
- 115 Durie Tile & Terrazzo Limited
- 116 Duron Ottawa Ltd.
- 117 Durwes Contracting Ltd.
- 118 F. & M. Precast Ltd.
- 119 Eastern Construction Ltd.
- 120 Ebenisterie Beaubois Ltee
- 121 F.G.M. Capf & Co. Ltd.
- 122 Ellis-Don Limited

- 123 Endo-Com Inc.
- 124 Eton Construction Ltd.
- 125 Famcorp Development Ltd.
- 126 Family & Children's Services of Renfrew County
- 127 S. W. Farrell & Sons (1979) Limited
- 128 Federal Tile & Marble Co.
- 129 Federal Masonry Contr.
- 130 Felmar Forking Limited
- 131 Georges Fillet Ltd.
- 132 R. Flaro Cartage Ltd.
- 133 Fontaine Concrete
- 134 Form-All Construction Ltd.
- 135 Frankfurt Investments
- 136 Franki Canada Limited
- 137 S. Furtner Masonry Con.
- 138 George & Asmussen Limited
- 139 Construction Camicon
- 140 General Concrete Drilling Services
- 141 G. M. Gest (1977) Inc.
- 142 Gil Bern Charles Corp. Ltd.
- 143 Gilcar Supervision & Management Limited
- 144 Construction P. H. Grager Inc.
- 145 Grant Ready Mix Ltd.
- 146 Greenspoon Bros. Ltd.
- 147 H & N Masonry
- 148 Bob Hendricksen Const.
- 149 Internorth Const. Co. Ltd.
- 150 Interprovincial Masonry
- 151 ITA Can. Demolition Inc.
- 152 Itarcan Construction Incorporated
- 153 The Jackson-Lewis Co. Ltd.
- 154 Janin Bldg. & Civil Works
- 155 Kerstone Contractors Limited
- 156 Kingston Byers Inc.
- 157 W. D. Laflamme Limited
- 158 Gerard Lefleur Masonry Ltd.
- 159 Laframboise Mechanical
- 160 Lalonde Concrete Drilling
- 161 Construction Lariviere Ltd.
- 162 G. Lavictoire and Brothers Ltd.
- 163 Leader Structures (Ont.)
- 164 J & A Levasseur Const.
- 165 Litwick Bros.
- 166 Longyear Canada Inc.
- 167 Loremar Structures Inc.
- 168 M. P. Lundy Const. (Ont.) Ltd.
- 169 M & U Masonry
- 170 R. Mannarino Construction Inc.
- 171 M. V. Mark Inc.
- 172 Marley Canadian Inc.
- 173 V. R. Mason Construction

- 174 Matthews Group Limited
- 175 McGonigal Masonry Const.
- 176 Mike Union Concrete
- 177 Milne & Nicholls Ltd.
- 178 J. C. Moag Co. Ltd.
- 179 Monarch Preco 1984 Ltee
- 180 Mount Royal Concrete Ltd.
- 181 Murphy & Morrow Limited
- 182 Nation Drywall Cont. Ltd.
- 183 New Vision Construction Co. Ltd.
- 184 Newman Bros. Limited
- 185 Newmarch Mech. Const. Ltd.
- 186 Nicholls-Radke & Assoc.
- 187 R. J. Nicol Const. Ltd.
- 188 J. R. Noel Plastering Limited
- 189 B. J. Normand Ltd.
- 190 North Builders
- 191 293652 Ontario Limited
- 192 485600 Ontario Inc.
- 193 542929 Ontario Limited
- 194 614738 Ontario Limited
- 195 Ontario Hydro
- 196 Orion Forming Limited
- 197 Online Construction Ltd.
- 198 Gary Oswald Blasting Inc.
- 199 Ottawa Carleton Bricklaying & Masonry Ltd.
- 200 Ottawa Concrete Flooring Co. Ltd.
- 201 Ottawa G.S.B. Construction Co. Ltd.
- 202 Ottawa R & R Const. Ltd.
- 203 Ottawa Structural Concrete Services Ltd.
- 204 Entreprises de Constr.
- 205 Gilles Parent Constr.
- 206 PCL Industrial Constructors Inc.
- 207 PDI Structures (1982) Inc.
- 208 Pigott Construction Limited
- 209 Pitts Engineering
- 210 Pre Con Company
- 211 Prince of Wales Complex
- 212 Regal Forming Ltd.
- 213 Richard and B. A. Ryan Limited
- 214 Rock-Ford Conc. Drilling
- 215 Ron Engineering and Construction Limited
- 216 Rose Mechanical Ltd.
- 217 Ross & Anglin Limited
- 218 Rosto Construction Ltd.
- 219 W. Rourke Ltd.
- 220 Sapacon Drywall Ltd.
- 221 Ken Scharf Construction
- 222 Schokbeton Quebec Inc.
- 223 Shameram Forming Co. Ltd.
- 224 Sly-Crete

- 225 Spada Tile Inc.
- 226 Spie Construction Inc.
- 227 Canadian Stebbins
- 228 Suburban Plastering Co.
- 229 M. Sullivan & Sons Ltd.
- 230 Les Industries Symetrie
- 231 T.D.S. Demolition Inc.
- 232 Tantalus Const. Co. Ltd.
- 233 Teperman and Sons Inc.
- 234 Tilechem Limited
- 235 T. N. Erectors Ltd.
- 236 Toddglen Construction Ltd.
- 237 (Number Not Used)
- 238 Trak Drilling
- 239 Tristan Incorporated
- 240 (Number Not Used)
- 241 Union Masonry Ltd.
- 242 Vanbots Construction Corp.
- 243 Vanis Masonry Construction Company Ltd.
- 244 Vulcan Asphalt & Supply
- 245 West End Tile Limited
- 246 West Front Const. Ltd.
- 247 (Number Not Used)
- 248 Zopras Construction Ltd.
- 249 Cliffside Utility Contractors Ltd.
- 250 Con-Elco Ltd.
- 251 J. M. Fuller Ltd.
- 252 G. M. Gest Inc.
- 253 Canadian Conduit & Cable Constructors Inc.
- 254 Par-Tex Engineering & Contracting Co. Ltd.
- 255 Smale Bros. Company Limited
- 256 R. Willett Contracting Limited
- 257 Area Construction Inc.
- 258 (Duplicates No. 47)
- 259 Atlas Construction Inc.
- 260 Bre-Ex Limited
- 261 Clarkson Construction Company Limited
- 262 Cliffside Pipelayers
- 263 Con-Drain Company Ltd.
- 264 Con-Strada Co. Ltd.
- 265 G. E. Crandell Construction Ltd.
- 266 Duntri Construction
- 267 Kent County Contractors
- 268 LeBrun Construction Ltd.
- 269 Ontario Paving Company Ltd.
- 270 Rok Pipelines Inc.
- 271 Viking Explosives Contracting Ltd.
- 272 Wardet Limited
- 273 George Wimpey Canada Ltd.
- 274 Capital Paving Inc.

The Board's notices to the following 16 employers were returned undelivered:

- 255 Smale Bros. Company Limited
- 257 Area Construction Inc.
- 259 Atlas Construction Inc.
- 260 Bre-Ex Limited
- 262 Cliffside Pipelayers
- 263 Con-Drain Company Ltd.
- 264 Con-Strada Co. Ltd.
- 265 G. E. Crandell Construction Ltd.
- 266 Duntri Construction
- 267 Kent County Contractors
- 268 LeBrun Construction Ltd.
- 269 Ontario Paving Company Ltd.
- 270 Rok Pipelines Inc.
- 271 Viking Explosives Contracting Ltd.
- 272 Wardet Limited
- 273 George Wimpey Canada Ltd.

160 employers did not respond to the Board's notice:

- 1 Asplundh Brush Control
- 5 Besharah Construction, Division of Beshara Dev.
- 6 Bob Henricksen Construction
- 9 Dineen Construction Ltd.
- 13 Econo Excavating & Paving
- 14 Fix Fast Limited
- 16 Gary Oswald Blasting Inc.
- 17 Geodex Foundation Inc.
- 19 H. J. MacFarland Construction
- 20 L. J. Dery Construction
- 22 Miwel Construction Ltd.
- 25 J. E. Construction Inc.
- 26 Petrifond Foundation Co.
- 27 Pitts Engineering
- 28 R. Mannarino Construction Inc.
- 30 Art Spino Enterprises Inc.
- 34 W. D. LaFlamme Ltd.
- 35 S. W. Farrell & Sons (1979) Ltd.
- 36 V. K. Mason Construction
- 37 Underground Services Ltd.
- 40 Bradley Kelly Construction Ltd.
- 42 Enercom Construction Inc.
- 43 G. M. Gest (1977) Inc.
- 45 M. V. Mark Inc.
- 46 Robert B. Somerville Co.
- 48 A & G D'Angelo Drywall Ltd.
- 49 Soudure Gen. A. Cyr Enr.
- 50 A.R.T. Tile & Marble Co.
- 51 Alexandria Builder's Sup.
- 52 Aluminium Alabrie
- 53 Amentea Masonry Contr. (133 Spadina)

- 54 Amentea Masonry Contr. (108 Lerreton)
- 57 Anthes Equipment Ltd.
- 58 Joe Arban Contract Ltd.
- 61 Asbestos Erectors
- 62 B. Atkinson Const. Ltd.
- 63 B.D.L. Contractors Ltd.
- 64 B.I.P. Construction Ltd.
- 65 M. Baker Trucking T. Baker
- 68 Bectar Corporation
- 73 Brikon Mansonry Inc.
- 76 ED. Brunet & Fils Ltee
- 77 Bulward Const. Ltd.
- 80 Cem-Al Spray Limited
- 82 Central Precast Products
- 84 Chateau Guay Insulation
- 85 V. J. Cianci Enterprises
- 86 Claus Arp Masonry
- 90 R. L. Coolsaet of Can. Ltd.
- 91 Cornwall & Dist. Con. Ltd.
- 95 Creston Forming Ltd.
- 96 D'angelo Plastering
- 97 D. F. Forming Ottawa Ltd.
- 100 Dalton FNG. & Const. Ltd.
- 101 P. J. Daly Contracting Ltd.
- 103 Dakrow Developments Ltd.
- 105 Deep Foundations Contr.
- 107 D. J. Dery Construction
- 108 Dibco Underground Limited
- 109 Dinacon Construction Ltd.
- 111 Dufferin Construction Co.
- 112 Dulepka Equipment Rentals
- 114 Duntri Construction
- 118 F. & M. Precast Ltd.
- 119 Eastern Construction Ltd.
- 120 Ebenisterie Beaubois Ltee
- 121 F.G.M. Capf & Co. Ltd.
- 122 Ellis-Don Limited
- 123 Endo-Com Inc.
- 124 Eton Construction Ltd.
- 125 Famcorp Development Ltd.
- 126 Family & Children's Services of Renfrew County
- 128 Federal Tile & Marble Co.
- 129 Federal Masonry Contr.
- 130 Felmar Forking Limited
- 131 Georges Fillet Ltd.
- 133 Fontaine Concrete
- 134 Form-All Construction Ltd.
- 135 Frankfurt Investments
- 136 Franki Canada Limited
- 137 S. Furtner Masonry Con.
- 139 Construction Camicon

- 141 G. M. Gest (1977) Inc.
- 146 Greenspoon Bros. Ltd.
- 147 H & N Masonry
- 148 Bob Hendricksen Const.
- 149 Internorth Const. Co. Ltd.
- 150 Interprovincial Masonry
- 151 ITA Can. Demolition Inc.
- 153 The Jackson-Lewis Co. Ltd.
- 154 Janin Bldg. & Civil Works
- 156 Kingston Byers Inc.
- 159 Laframboise Mechanical
- 160 Lalonde Concrete Drilling
- 161 Construction Lariviere Ltd.
- 163 Leader Structures (Ont.)
- 164 J & A Levasseur Const.
- 165 Litwick Bros.
- 167 Loremar Structures Inc.
- 168 M. P. Lundy Const. (Ont.) Ltd.
- 169 M & U Masonry
- 173 V. R. Mason Construction
- 174 Matthews Group Limited
- 175 McGonigal Masonry Const.
- 176 Mike Union Concrete
- 177 Milne & Nicholls Ltd.
- 178 J. C. Moag Co. Ltd.
- 179 Monarch Preco 1984 Ltee
- 180 Mount Royal Concrete Ltd.
- 181 Murphy & Morrow Limited
- 182 Nation Drywall Cont. Ltd.
- 184 Newman Bros. Limited
- 185 Newmarch Mech. Const. Ltd.
- 186 Nicholls-Radke & Assoc.
- 187 R. J. Nicol Const. Ltd.
- 189 B. J. Normand Ltd.
- 190 North Builders
- 191 293652 Ontario Limited
- 192 485600 Ontario Inc.
- 193 542929 Ontario Limited
- 194 614738 Ontario Limited
- 195 Ontario Hydro
- 197 Online Construction Ltd.
- 198 Gary Oswald Blasting Inc.
- 202 Ottawa R & R Const. Ltd.
- 204 Entreprises de Constr.
- 205 Gilles Parent Constr.
- 209 Pitts Engineering
- 210 Pre Con Company
- 211 Prince of Wales Complex
- 212 Regal Forming Ltd.
- 214 Rock-Ford Conc. Drilling
- 216 Rose Mechanical Ltd.

- 217 Ross & Anglin Limited
- 218 Rosto Construction Ltd.
- 219 W. Rourke Ltd.
- 220 Sapacon Drywall Ltd.
- 222 Schokbeton Quebec Inc.
- 223 Shameram Forming Co. Ltd.
- 224 Sly-Crete
- 227 Canadian Stebbins
- 228 Suburban Plastering Co.
- 230 Les Industries Symetrie
- 231 T.D.S. Demolition Inc.
- 232 Tantalus Const. Co. Ltd.
- 234 Tilechem Limited
- 235 T. N. Erectors Ltd.
- 236 Toddglen Construction Ltd.
- 239 Tristan Incorporated
- 241 Union Masonry Ltd.
- 242 Vanbots Construction Corp.
- 245 West End Tile Limited
- 246 West Front Const. Ltd.
- 248 Zopras Construction Ltd.
- 249 Cliffside Utility Contractors Ltd.
- 250 Con-Elco Ltd.
- 251 J. M. Fuller Ltd.
- 252 G. M. Gest Inc.
- 253 Canadian Conduit & Cable Constructors Inc.
- 254 Par-Tex Engineering & Contracting Co. Ltd.

85 employers made employer filings in Form 94:

- 2 Beaver Asphalt Paving Company Limited
- 3 Beaver Construction Group Limited, Beaver Construction
Ontario Division
- 7 Deschenes Structures (Eastern) Inc.
- 8 Dibblee Construction Limited
- 10 Dufresne Piling Co. (1967) Ltd.
- 11 Central Paving Reg'd 388685 Ontario Limited
- 12 Choctaw Const. Co. Ltd.
- 15 Francon-Ottawa, Division of Lafarge Canada Inc.
- 18 Loretta Paving Company Limited
- 21 S. McNally & Sons Ltd.
- 23 O'Leary's Limited
- 31 Spino Construction Co. Ltd.
- 32 Taggart Construction Limited
- 33 Torus Construction Ltd.
- 38 Vallance & Levy Eng. Contractors Ltd.
- 39 Beaver Pipeline Construction
- 41 Denis Brisbois Contractor Ltd.
- 44 Lundrigans Construction Limited
- 47 Armbro Materials & Construction Ltd.
- 55 Anchor Shoring Ltd.
- 56 T. A. Andre and Sons (Ontario) Limited

- 60 Arnprior Builders Supplies
- 66 Banchini Limited
- 67 Canadian BBR (1980) Inc.
- 69 Begg & Daigle Store & Office Interiors
- 70 Bellai Brothers Ltd.
- 71 R. J. Bender Construction Ltd.
- 72 Bot Construction Ltd.
- 74 Brilok Construction (1985) Limited
- 78 Concrete Column Clamps (C.C.C.) Ltd.
- 79 Cardinal Refractories Inc.
- 83 Century Manor
- 87 Clifford Masonry Limited
- 88 Colibri Construction Inc.
- 89 Comstock International Ltd.
- 92 Cornwall Gravel Co. Ltd.
- 93 Cos-Bar Ltd.
- 94 Cote & Ryde Construction Ltd.
- 98 D.M.A. Masonry Limited
- 99 Dalacoustic Contractors Ltd.
- 102 Paul Daoust Construction Ltd.
- 104 De Marinis (DMA) Incorporated
- 106 Delta Tile & Terrazzo Co. Limited
- 113 Dumoulin and Associates Reparations de Beton Limitee
- 115 Durie Tile & Terrazzo Limited
- 116 Duron Ottawa Ltd.
- 117 Durwes Contracting Ltd.
- 127 S. W. Farrell & Sons (1979) Limited
- 132 R. Flaro Cartage Ltd.
- 138 George & Asmussen Limited
- 140 General Concrete Drilling Services
- 142 Gil Bern Charles Corp. Ltd.
- 143 Gilcar Supervision & Management Limited
- 144 Construction P. H. Grager Inc.
- 145 Grant Ready Mix Ltd.
- 152 Itarcan Construction Incorporated
- 155 Kerstone Contractors Limited
- 157 W. D. Laflamme Limited
- 158 Gerard Lefleur Masonry Ltd.
- 162 G. Lavictoire and Brothers Ltd.
- 166 Longyear Canada Inc.
- 170 R. Mannarino Construction Inc.
- 171 M. V. Mark Inc.
- 172 Marley Canadian Inc.
- 183 New Vision Construction Co. Ltd.
- 188 J. R. Noel Plastering Limited
- 196 Orion Forming Limited
- 199 Ottawa Carleton Bricklaying & Masonry Ltd.
- 200 Ottawa Concrete Flooring Co. Ltd.
- 201 Ottawa G.S.B. Construction Co. Ltd.
- 203 Ottawa Structural Concrete Services Ltd.
- 206 PCL Industrial Constructors Inc.

- 207 PDI Structures (1982) Inc.
- 208 Pigott Construction Limited
- 213 Richard and B. A. Ryan Limited
- 221 Ken Scharf Construction
- 225 Spada Tile Inc.
- 226 Spie Construction Inc.
- 229 M. Sullivan & Sons Ltd.
- 233 Teperman and Sons Inc.
- 238 Trak Drilling
- 243 Vanis Masonry Construction Company Ltd.
- 244 Vulcan Asphalt & Supply
- 256 R. Willett Contracting Limited
- 261 Clarkson Construction Company Limited

Five employers replied by letter but did not make an employer filing in Form 94:

- 29 Schwenger Construction Ltd.
- 81 The Cementation Company (Canada) Limited
- 126 Family & Children's Services of Renfrew County
- 270 Rok Pipelines Inc.
- 274 Capital Paving Inc.

51 of the 90 employers who replied by letter or in Form 94 dispute Local 527's claim to bargaining rights for their construction labourers employed in the relevant sectors and Board area:

- 4 Beaver Underground Limited
- 15 Francon-Ottawa, Division of Lafarge Canada Inc.
- 29 Schwenger Construction Ltd.
- 31 Spino Construction Co. Ltd.
- 44 Lundrigans Construction Limited
- 55 Anchor Shoring Ltd.
- 56 T.A. Andre and Sons (Ontario) Limited
- 60 Arnprior Builders Supplies
- 67 Canadian BBR (1980) Inc.
- 69 Begg & Daigle Store & Office Interiors
- 70 Bellai Brothers Ltd.
- 71 R.J. Bender Construction Ltd.
- 72 Bot Construction Ltd.
- 74 Brilok Construction (1985) Limited
- 78 Concrete Column Clamps (C.C.C.) Ltd.
- 81 The Cementation Company (Canada) Limited
- 83 Century Manor
- 88 Colibri Construction Inc.
- 89 Comstock International Ltd.
- 92 Cornwall Gravel Co. Ltd.
- 94 Cote & Ryde Construction Ltd.
- 99 Dalacoustic Contractors Ltd.
- 102 Paul Daoust Construction Limited
- 104 De Marinis (DMA) Incorporated
- 110 Donalco Services Ltd.
- 115 Durie Tile & Terrazo Limited
- 116 Duron Ottawa Ltd.
- 117 Durwes Contracting Ltd.

126 Family & Children's Services of Renfrew County
 132 R. Flaro Cartage Ltd.
 142 Gil Bern Charles Corp. Ltd.
 143 Gilcar Supervision & Management Limited
 145 Grant Ready Mix Ltd.
 162 G. Lavictoire and Brothers Ltd.
 200 Ottawa Concrete Flooring Co. Ltd.
 201 Ottawa G.S.B. Construction Co. Ltd.
 203 Ottawa Structural Concrete Services Ltd.
 206 PCL Industrial Constructors Inc.
 207 PDI Structures (1982) Inc.
 208 Pigott Construction Limited
 221 Ken Scharf Construction
 225 Spada Tile Inc.
 226 Spie Construction Inc.
 229 M. Sullivan & Sons Ltd.
 233 Teperman and Sons Inc.
 238 Trak Drilling
 244 Vulcan Asphalt & Supply
 256 R. Willett Contracting Limited
 259 Atlas Construction Inc.
 261 Clarkson Construction Company Limited
 274 Capital Paving Inc.

13. The Board's Form 93 notice expresses some warnings for the employer to whom it is addressed. Paragraph 3 of the notice cautions the employer that "... on the basis of material now before the Ontario Labour Relations Board you may be found to be an employer in the unit of employers ..." described in the application. Part I of the notice ends with this caution printed in bold-face type:

WHERE AN EMPLOYER FILING INDICATES A DESIRE ON THE PART OF THE EMPLOYER TO MAKE REPRESENTATIONS TO THE BOARD WITH RESPECT TO THE APPLICATION, THE BOARD MAY DISPOSE OF THE APPLICATION WITHOUT CONSIDERING THE REPRESENTATIONS SET OUT IN THE EMPLOYER FILING OF ANY EMPLOYER WHO FAILS TO APPEAR AT THE HEARING.

The employer also receives with the notice a Form 94 - Employer Filing, Application for Accreditation, Construction Industry. It asks the employer to state, amongst other things, whether the respondent trade union is/is not entitled to bargain on behalf of the employees of the employer affected by the application and whether the employer has/has not employed such employees within one year prior to the date of the making of the application. The Form 93 notice also requires the employer to file a list of employees in the form of the schedule attached to the notice. That schedule is titled "Schedule - H - List of Employees - Accreditation" and it calls for the employer to list on it employees affected by the application on whose behalf the respondent is entitled to bargain, and who were working in the relevant sectors and geographic area during the weekly payroll period immediately preceding the application date.

14. Once the Board has resolved any numerically relevant disputes respecting Schedules "E" and "H", the information which they contain, together with the documentary evidence filed by the applicant to satisfy the Board that it has the appropriate authority to discharge the responsibilities of an accredited bargaining agent, provide all of the information needed by the Board to make the findings called for by clauses (a), (b) and (c) of subsection 127(1). In turn, from those

findings, the Board is able to satisfy itself whether the “double majority” test posed by subsection 127(2) of the Act has been met. It is evident that the Board can ascertain everything that it is required to ascertain under subsection 127(1) and satisfy itself of everything about which it needs to satisfy itself under subsection 127(2) without having to decide the correctness of the Schedule “F” except, of course, to deal with any issue that an employer who is listed on Schedule “F” should in fact be listed on Schedule “E”. The correctness of Schedule “E” also could be affected if the union did not file a Schedule “F” and there was an employer who, unknown to the union, did have employees in the area and sectors affected by the application in the relevant period because, if the union left such an employer off Schedule “F”, the employer would not know to bring to the Board’s attention the fact that it had in its employ at the relevant time employees represented by the trade union.

15. The Board’s decisions accrediting employers’ organizations usually have referred to both a Final Schedule “E” and a Final Schedule “F”. It is evident also from its decisions that the Board has resolved any issues respecting Schedule “F” prior to making the findings required by subsections 127(1) and (2). A typical Board decision accrediting an employers’ organization will list the employers on Final Schedules “E” and “F” under those headings before setting out the Board’s findings under subsections 127(1) and (2). The employers on each final schedule also are named in the accreditation certificate as being employers “... for whom the applicant becomes bargaining agent...” under the certificate. This is consistent with paragraph 8 of the Board’s “Notes on Accreditation”, dated October 20, 1971, as published in the Board’s Rules of Procedure, Regulations and Practice Notes. Paragraph 8 reads:

8. It has been the practice of the Board to include, both in the decision and in the certificate of accreditation, the names of the individual employers affected by the application and determined by the Board to be in the unit of employers and bound by the accreditation order.

This manner of dealing with the lists of employers in its accreditation decisions and certificates reveals an intent of the Board to make a global, “once and for all” determination of which employers would be covered, as at the date of application, by the accreditation certificate. That intent seems to be borne out by the Board’s decisions in *Valentine Enterprises Contracting*, and *John Hayman & Sons Company Limited* referred to by counsel for Local 527.

16. Valentine was an employer who had been named in the Final Schedule “F” of an unreported accreditation decision and its attendant accreditation certificate, both of which had issued February 18, 1975. Some two and a half years later when the trade union took the position that it held bargaining rights for Valentine’s employees under the collective agreement with the accredited association, Valentine disputed those bargaining rights and applied to the Board for reconsideration of its February 18, 1975, decision insofar as the decision concerned Valentine. The Board heard the application and dismissed it. Valentine applied for judicial review of the Board’s February 18, 1975, decision on grounds which included the claim that the trade union had never acquired bargaining rights with respect to any of Valentine’s employees. In dismissing the application, the court found that Valentine had received proper notice that its rights might be affected by the application. The court went on to conclude that the Board’s finding that the trade union was the bargaining agent for employees of Valentine was a finding of fact required of the Board in discharging its jurisdiction and, even if the Board may have erred in making it, the finding was not open to review by the court because of the privative provisions of what is now section 108 of the Act. *Valentine Enterprises v. Toronto Construction Association*, 80 CLLC ¶14,042.

17. In *John Hayman & Sons Company Limited*, [1986] OLRB Rep. April 513, application for reconsideration dismissed [1986] OLRB Rep. Nov. 1525, the trade union was seeking to have Hayman declared bound by the 1984-86 ironworkers’ provincial agreement between the Ontario

Erectors Association (“OEA”) and the designated employee bargaining agency for ironworkers. The applicant trade union had been party to a collective agreement with the OEA as an accredited employers’ association. The trade union’s bargaining rights under that collective agreement had been subsumed in the first ironworkers’ provincial agreement in 1978, and its subsequent renewals. The OEA had been an accredited employers’ organization by virtue of a certificate issued to it on May 31, 1974, as a result of an application which had been made on June 15, 1972. Hayman had not been listed as an employer covered by the accreditation decision or the certificate which issued to the OEA. The trade union claimed that Hayman had become bound by that certificate because of bargaining rights which the union claimed to have acquired after the application for accreditation had been made. Its claim was based on a collective agreement executed between the union and a different employers’ association after June 15, 1972. The parties asked the Board to assume, without finding, that the collective agreement on which the trade union relied contained bargaining rights for ironworkers employed by Hayman. The Board found that the bargaining rights asserted by the trade union had not been acquired after the application date, rather they were rights which the trade union would have held at the time the application was made. Therefore, the trade union could not rely on the subsection 127(2) prescription that the OEA was accredited to represent “...such other employers for whose employees the trade union...may, after the date of making of the application, obtain bargaining rights through...voluntary recognition in the appropriate geographic area and sector.”. As a consequence of the Board’s decisions, *supra*, the trade union applied for reconsideration of the May 31, 1974 accreditation decision. The grounds for its application included the claim that Hayman, along with other employers for whose employees the union also had asserted the same bargaining rights, had been inadvertently left off the list of employers for whom the trade union had claimed bargaining rights at that time. The application was dismissed.

18. These cases were said by the parties hereto to reflect problems which they contend would be resolved were the Board not to compile a Final Schedule “F” when disposing of an application for accreditation. Ceasing to compile a Final Schedule “F”, however, does not resolve the problem created when an employer whose rights may be directly affected by the application is not given proper notice of it because the union failed to claim its bargaining rights for the employer’s employees. The potential for that problem to occur exists whether or not a Final Schedule “F” is compiled. It is not unreasonable, however, that employers and other parties potentially affected by an application for accreditation would have derived a sense of certainty about which employers would be affected by an accreditation certificate from the Board’s practice of compiling a Final Schedule “F” and listing those employers in the accreditation decision and certificate. This is because Final Schedule “F” and Final Schedule “E” together list all of those employers found by the Board to be in the unit of employers as at the date of making of the application. Since subsection 127(2) also directs the Board to accredit the employers organization as bargaining agent for “...such other employers for whose employees the trade union...may, after the date of making of the application, obtain bargaining rights through certification or voluntary recognition...”, any issue of whether such employers are covered by the accreditation certificate, would be resolved simply by proving the trade union’s subsequently acquired bargaining rights. Thus, whether the claim that an employer was covered by an accreditation certificate was based on bargaining rights said to have been acquired prior to or after the date of application, settling the issue was seen to be a relatively straightforward matter. It is the prospect of losing that sense of certainty if the Board does not compile a Final Schedule “F” in this case and the potential for employers unknowingly to incur liability for damages that led the parties and the employers to agree on the notice provisions and waiver of damages referred to at paragraph 5 above.

19. The Board’s practice of compiling a Final Schedule “F” may have given employers a sense of certainty as to whether they were included in a unit of employers described in a particular

accreditation certificate, but it is clear that it has come from the Board having resolved prospective issues which were not always relevant to answering the questions posed by subsections 127(1) and clauses (a) and (b) of subsection 127(2) which had to be settled in order for the Board to have jurisdiction to issue the accreditation certificate in the first place. While the Board has to identify all those employers who may be in the unit of employers in order to give them proper notice of the application (employers listed by the union on Schedule “F” fall in that category), there is nothing in the Act or the Board’s Rules of Procedure which expressly requires the Board to name those persons or decide conclusively whether such persons are in the unit unless their presence or absence would affect the outcome of the double majority requirement of subsection 127(2). The Board’s decision in the instant case which issued June 28, 1988, shows that the Board has been able to satisfy itself that the applicant has met the requirements of clauses (a) and (b) of subsection 127(2) without the Board needing to name or decide conclusively the employers who, as at the date of making of the application, would be included in the unit but not included in the number of employers ascertained by the Board under subsection 127(1). They are the employers who would be in the unit of employers on the application date but who, within one year prior to that date, have not had in their employ employees for whom Local 527 had the requisite bargaining rights. In other words, there has been no need for the Board to develop the list of employers which past Board decisions have called Final Schedule “F”.

20. For the Board to compile a Final Schedule “F” in this case, it would have to decide Local 527’s claim that it was the bargaining agent for employees employed by 244 of the 267 employers on the Schedules “E” and “F” filed by Local 527. With respect to approximately 235 of those 244 employers, Local 527 is relying on the five collective agreements listed at paragraph 4 of this decision in order to establish its claim that it is the bargaining agent for their employees. Therefore, the Board would have to determine whether those collective agreements established the bargaining rights asserted by Local 527. That would require the Board to hear the evidence and representations of the multiple parties to those agreements and the employers bound by them who responded to the Board’s Notices of Hearing into these issues. Considering the number of parties involved and the potential complexity of the issue, this task would be time consuming and expensive to the parties involved, and an expensive use of the Board’s resources. Moreover, except for the three employers referred to in paragraph 9 of the Board’s June 28th decision, whom the Board found should not be included on Final Schedule “E”, no employer or other party had alleged that any of the remaining 244 employers for whose employees Local 527 is claiming bargaining rights had employees in the area and sectors affected by the application in the requisite time period, so there was no need for the Board to resolve Local 527’s bargaining rights claim respecting any of those employers in order to satisfy itself that the applicant has met the double majority requirements of subsection 127(2). Since the Board also has determined the appropriate unit of employers and has satisfied itself that the applicant is a properly constituted organization and that each of the employers whom it represents has vested the appropriate authority in it to enable it to discharge the responsibilities of an accredited bargaining agent [subsection 127(3)], there are no remaining issues for the Board to resolve which possibly could affect the applicant’s entitlement to accreditation. Therefore, deciding whether each of the 244 employers would be bound to an accreditation certificate issued to the applicant is redundant to the Board’s acquisition of jurisdiction under subsection 127(2) of the Act to accredit the applicant. The question remaining for the Board is whether the Board is required to make that determination in order to fulfil its jurisdiction by accrediting the applicant.

21. Subsection 127(2) directs the Board to fulfil its jurisdiction by accrediting the applicant “... as the bargaining agent of the employers in the unit of employers and for such other employers for whose employees the trade union ... may, after the date of making of the application, obtain bargaining rights through certification or voluntary recognition in the appropriate geographic area

and sector.”. The direction includes two groups of employers: first, those employers who would be in the unit because, as at the application date, Local 527 held the requisite bargaining rights for their employees; and second, those employers for whom Local 527 later acquired the requisite bargaining rights. The reference in the direction to “...employers in the unit of employers ...” is a clear reference to the first group of employers. Standing alone, the direction that the Board “...shall accredit the employers’ organization as a bargaining agent of the employers in the unit of employers ...” might be interpreted as directing the Board to identify the individual employers in that first group of employers. The direction is, however, only one part of the broader direction incorporating both groups of employers. It is also in a context where, in order for the Board to have acquired the jurisdiction to comply with the direction, it has had to answer the specific questions posed by sections 125 and 126 of the Act and subsections 127(1) and 127(2). As long as proper notice has been given to those employers who may be in the unit of employers, none of the questions posed by the Act requires the Board to name those individual employers who would be in the unit of employers because Local 527 had the requisite bargaining rights for their construction labourers, but who would not affect the outcome of the double majority requirement of subsection 127(2). Those questions do require the Board to ascertain the number of those employers who, within one year prior to the application date, had in their employ construction labourers for whom Local 527 had the requisite bargaining rights. The Board has made that determination at paragraph 10 of its June 28th decision.

22. Were the Board to interpret the direction to “...accredit the employers’ organization as bargaining agent of the employers in the unit of employers...” as requiring it to decide conclusively and name those employers in the first group covered by the direction, it is readily apparent that the Board would have to adjudicate an issue which cannot affect the Board’s acquired jurisdiction to accredit the applicant. It would affect only the form and content of the certificate by which the Board accredits the employer’s organization and fulfills the Board’s jurisdiction. Whether the parties were to litigate the issue before the Board at the same time when they are litigating the issues which are essential to the Board’s acquisition of jurisdiction or after the Board has satisfied itself that it has jurisdiction to accredit, the final disposition of the application would be delayed. Since time is always of the essence in disposing of applications involving representation rights, it is to be expected that the Legislature would seek to avoid unnecessary litigation. Therefore, had the Legislature intended that disposition of accreditation applications be delayed while the Board decides conclusively who are the individual employers in one group of employers covered by the accreditation certificate, it would be reasonable to suppose that the Legislature would have directed the Board in express terms to make that finding. For example, that could have been made one of the findings required under subsection 127(1) of the Act.

23. Having regard to the fact that the Legislature did not expressly require that finding, that to make the finding would delay disposition of the application without otherwise effecting its outcome, and since the direction in subsection 127(2) is not limited to “...the employers in the unit of employers...”, the Legislature, in the Board’s view, intended only that the Board’s accreditation certificate make it clear that the applicant was being made bargaining agent for both groups of employers described in the subsection 127(2) direction. It is the Board’s further view that the Legislature did not intend the Board to decide conclusively who are the individual “...employers in the unit of employers...” before accrediting the applicant except insofar as it is necessary to do so in the process of the Board acquiring jurisdiction to accredit the applicant.

24. Were the Board to accredit the applicant herein without compiling a Final Schedule “F”, it would be proceeding in a manner consistent with its disposition, in generally analogous circumstances, of an application for certification in the *Robin Hood* case, *supra*, referred to in the submissions of Local 527. In the *Robin Hood* case, the Board was able to settle the description of

the appropriate bargaining unit as required by subsection 6(1) of the Act and to answer the questions posed by subsections 7(2) and 7(3), even though it had not determined the precise number of employees who were employed in the bargaining unit at the date of making of the application. Subsection 7(1), on its face, requires the Board to ascertain the number of employees in the bargaining unit at that time as well as the number who were members of the trade union at the requisite time for determining trade union membership under the Act. The Board acknowledged that a literal interpretation of the subsection could require the Board to determine the precise number of employees in the unit before it had jurisdiction to issue a certificate to the trade union. The Board reasoned, however, that, as long as the Board could say with certainty that the percentage of members among bargaining unit employees is more than fifty-five per cent or that it is not less than forty-five per cent and not more than fifty-five per cent (the requisite percentages of membership established by subsection 7(2) of the Act), the Board had discharged the obligation imposed on it by subsection 7(1). For the Board to go further and adjudicate the precise number of employees in the unit would be to delay the final disposition of the certification application in order to decide something which was of no consequence to the outcome of the application. The Board found that it had jurisdiction to issue the final certificate and did so without determining the precise number of employees in the unit.

25. The logic of the Board's purposive approach in the *Robin Hood* decision, in our view, applies equally to the exercise of the Board's jurisdiction to accredit an employers' organization under the accreditation provisions of the Act. That is, where the Board has acquired jurisdiction under subsection 127(2) to accredit an employers' organization without having had to determine all of the employers who would be in the unit of employers, absent a specific direction in the Act to decide conclusively who are those individual employers, the Board should not delay the final disposition of the application while it makes that determination. The Board does not need to deal with issues which may arise prospectively.

26. Therefore, having regard to all of the foregoing, to the fact that the Board is satisfied that adjudicating Local 527's bargaining rights claims would not alter the fact that the double majority established by clauses (a) and (b) of subsection 127(2) has been met, to the agreement of the parties and in all the circumstances of this application, the Board will not compile a Final Schedule "F" for the application.

27. The Board's decision is not to be taken as finding after the fact that Local 527, when it received the Board's notice of the application, was not then obliged to identify all those employers whom it would ever claim to be covered by the accreditation certificate issued to the applicant were the application to succeed. As is suggested by the Board's observation at paragraph 11 above, if Local 527 has not been diligent in identifying all of the employers whom it claims were in the unit of employers as at the date of making of this application for accreditation, it could experience problems if any employer whose legal rights were affected by it did not get proper notice of the application. Certainly, any lack of diligence which results in an employer who should have received notice of Local 527's claim not getting notice, would enhance the risk that Local 527 would be found not to have the bargaining rights which it attempts to assert at some later date. For example, were Local 527 to claim at some later date that an employer not named on its Schedules "E" and "F" was in the unit of employers as at the application date, an argument could be made for not allowing it to litigate a claim which it could have advanced when the application was made. Furthermore, from the consequences of accreditation discussed above at paragraph 8, it is arguable that the union's bargaining rights cannot exist outside of the accreditation. Therefore, if the trade union is not allowed to litigate its claim, an argument could be made that it has abandoned the bargaining rights it was now trying to assert. This would be particularly so if, when the application was made, all that was required of Local 527 was to claim, without proving, that it held the rights.

Also, an argument certainly could be made that an employer who did not get proper notice when the application was made that his legal rights may be affected by it, would be entitled to apply to have the accreditation proceedings reopened if Local 527 later asserted that the employer was in the unit as at the date of application. This would be because of the possibility that the employer should have been listed on Schedule "E" and, therefore, counted for purposes of the double majority, or that the employer could challenge the facts respecting any other employer on Schedule "E" or any other matter relevant to the Board's original decision.

28. The Board turns now to the matter of the certificate of accreditation which should issue to the applicant. The unit of employers which the Board found to be appropriate for collective bargaining is described as follows at paragraph 7 of its decision which issued June 28, 1988:

...all employers of construction labourers for whom the Labourers International Union of North America, Local 527 has bargaining rights in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, constitute a unit of employers appropriate for collective bargaining.

When the parties made the agreement described at paragraph 5 of the instant decision, they also agreed to request the Board to apply a clarity note to that description. Therefore, having regard to the agreement of the parties and for the purpose of clarity, the Board declares that employers bound by the following speciality collective agreements operative in or affecting the roads, sewers and watermains, and heavy engineering sectors of the construction industry, amongst other sectors, binding between:

- (1) Labourers Ontario Provincial District Council and various civil engineering contractors;
- (2) Labourers Ontario Provincial District Council and the Utility Contractors Association of Ontario; and
- (3) Labourers Ontario Provincial District Council and the Ontario Pre-cast Manufacturers Association

are not included in the bargaining unit.

29. Having regard to all of the foregoing and to the findings in the Board's decision which issued June 28, 1988, in these matters, a Certificate of Accreditation will issue to the National Capital Roadbuilders Association for all employers of construction labourers for whom the Labourers International Union of North America, Local 527 has bargaining rights as at October 30, 1987, in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell and, in accordance with the provisions of subsection 127(2) of the *Labour Relations Act*, for such other employers whose employees the Labourers International Union of North America, Local 527 may after October 30, 1987, obtain bargaining rights through certification or voluntary recognition in the sectors and geographic area just described.

1882-84-JD The Labourers International Union of North America and The Labourers International Union of North America, Local 607, Complainants v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 628, **Premier Pipelines Limited** and/or Premier Lilley Resources, Pipe Line Contractors Association of Canada, Respondents

Jurisdictional dispute - Dispute involving work functions associated with a new method of joining steel pipe on a gas transmission pipeline - Board declining to apply criterion of job loss where cyclical employment relationship and new technology - Employer preference criterion not appropriate because no evidence as to basis for employer's preference - Employer did not participate in hearing - Board dividing work between Labourers Union and Plumbers and Pipefitters Union

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *S.B.D. Wahl*, *T. Connolly* and *P. Little* for the complainants; *A. J. Ahee*, *J. R. St. Eloi* and *G. Meservier* for United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 628; no one appearing for Premier Pipelines Limited and/or Premier Lilley Resources, Pipe Line Contractors Association of Canada.

DECISION OF THE BOARD; October 28, 1988

1. This is a work assignment complaint made under section 91 of the *Labour Relations Act*. The complainants, the Labourers International Union of North America and the Labourers International Union of North America, Local 607 (hereafter referred to jointly as "the Labourers") are seeking a direction that certain work in dispute be assigned to its members instead of to members of the respondents United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 628 (hereafter referred to jointly as "the UA") and to certain other persons employed under the direction of the corporate respondents Premier Pipelines Limited and/or Premier Lilley Resources (hereafter referred to jointly as "Premier"). A pre-hearing conference before a vice-chair of the Board was held for the complaint, but the pre-hearing vice-chair was not part of the panel constituted to hear the complaint on its merits.

2. The Board heard the evidence and representations of the parties during 13 days of hearing over a span of approximately 9 months. Premier and the Pipe Line Contractors Association of Canada ("the Association") participated in the pre-hearing conference but were not present or represented at the hearings into the merits of the complaint. The Board received extensive and detailed *viva voce* and documentary evidence. The Board's finding of facts herein have been derived from that evidence and the agreed facts contained in the brief prepared for the parties and this panel of the Board by the pre-hearing conference vice-chair on the agreement of the parties, having regard to the Board's assessment of the credibility of the witnesses and the submissions of the parties on how the Board was to interpret the evidence.

3. The general nature of the dispute involves certain work functions associated with a new method of joining steel pipe. The process involved is known by its trade name High Impact Weld-

ing, which the Board will refer to as “the Process” and will describe more fully hereunder. The dispute over the assignment of work arose out of the first trial use of the Process on a transmission pipeline. It took place on a six kilometre section of a gas transmission pipe line being built for Trans Canada Pipe Lines Limited. The trial section was located north of Thunder Bay, Ontario. The complaint describes Premier’s project as “...the 6.2 km. Trans Canada Pipelines Gas Mainline Project “Line 100-3” (hereafter referred to as “the Project”).

4. The dispute is about which trade, labourers represented by the Labourers, or pipefitters represented by the UA, will perform the work functions involved with: operating or tending certain specially designed equipment used for preparing the ends of pipe lengths which are to be joined; storing, removing from storage and transporting explosives used in the Process; preparing the sets of explosives and applying them to the pipe ends which are being joined; bringing the pipe ends together for joining, connecting detonators to the explosives; connecting the detonators to the detonating device and detonating the explosives.

5. The Process affects only that part of a traditional pipe line construction project concerned with the joining of the lengths of pipe which make up the line, including preparing the pipe ends for joining. The Process involves the use of special machines for preparing the pipe ends for joining. These are a bellling machine which expands the pipe end, without using heat, into a bell shape; two end preparation machines which attach to the pipe ends and clean a predetermined length of the two pipe ends being joined of any protective coating, mill scale, rust and dirt. One end preparation machine is used to clean the external surface of the pipe end referred to as the “spigot” end, and the other is used to prepare the internal surface of the one referred to as the “bell” end. The pipe ends are mated by aligning the two pipe lengths which are being joined, then placing the bell end over the spigot end. After the pipe ends have been mated, they overlap for a length of approximately four and one-half inches. Prior to mating, tape is applied to the external surfaces of the two pipe ends. The spigot end is taped at a point four and one-half inches from the pipe end to mark the limit of the pipe overlap. The tape is applied just prior to the placing of the internal charge. The bell end tape is applied to the last four and one-half inches of pipe end. The tape is applied before the external charge is placed on the pipe. Its purpose is to protect the pipe surface from being pitted by the blast. The area of the join, in other words, the overlap, is encircled by two rings of explosives charges, one encircling the inside of the spigot end and the other encircling the outside of the bell end. The detonation of these explosives charges makes the pipe joint. The pipe joint created by the energy of the explosion was described to the Board by Stephan Istvanffy, one of the two inventors of the Process, as a true metallurgical bond in which the crystal-line structure of the metal is altered.

6. The work on a traditional pipe line spread which would be replaced by the Process where conditions permit its use consists primarily of some of the work traditionally performed by the pipe and welding gangs. The joining of the pipes is accomplished by conventional welding. The ends of pipe being joined are bevelled, usually in the factory. The two lengths are properly aligned, using a line-up clamp if necessary, with the ends a prescribed distance apart. When they have been correctly aligned and “spaced”, they are joined by means of a tack weld around a short portion of the circumference of the join. The weld is accomplished by molten metal being placed between the two pipe ends. It freezes to the metal surfaces of the pipe ends and solidifies, forming a metal bridge between the two pieces of pipe. Next, a series of welding passes is made placing molten metal in the weld joint until it is filled, completing the joining of the pipes. In general terms, the job functions which would be replaced by the Process are those involved in the actual welding and the grinding of the welds to remove surface impurities and irregularities.

7. The work in dispute is described in minute detail in the brief prepared by the pre-hear-

ing conference vice-chair. With minimal exceptions, the Labourers and the UA are in agreement on the descriptive detail. Those exceptions involve the use of particular phrases in describing a step of the Process or a work function. In those situations, the brief records each trade unions' choice of phrase. Counsel for both unions used the description of work in dispute in the brief as a guide in directing their examinations of Istvanffy. As a result, he gave precisely detailed evidence of how the disputed work was performed on the Project. He also testified about the knowledge, skills and approximate length of time needed to perform the various tasks involved with the disputed work. This detail was very helpful to the Board in understanding the Process and the work tasks involved. While the Board has reviewed the detailed evidence, it is unnecessary for purposes of this decision to describe the work with that degree of detail.

8. Istvanffy's description of the Process as it was applied on the Project can be divided into two parts: work which is not part of the pipe joining cycle and work which is part of it. The Board finds it useful to describe the work in dispute, as it was performed on the Project, in terms of that same division. For each part, the Board will describe in order the major work components involved, the equipment used, the work components which are in dispute and, for purposes of clarity, the work components which are not in dispute.

9. Work which was *not* part of the pipe joining cycle was work which is necessary to achieving a good join, but could be done ahead of the joining operation. It was done as much as 15 pipe lengths ahead of the joining operation. The major work components involved were preparing the pipe ends, including belling the pipe and preparing the bell and spigot pipe ends; preparing the explosives charge which encircles the exterior of the bell end of the pipe, hence the external charge, in the explosives preparation truck; transferring the explosives charge to the external charge application jig; and placing the explosives around the outside of the bell end of the pipe. Other tasks involved taping the external surface of the bell end; stringing the blast wires in or on the pipe for the spigot end and the bell end explosives charges; and transporting and storing explosives.

10. The equipment used in these operations included an explosives truck for transporting explosives once or twice daily from the powder magazine to the preparation trucks; an explosives preparation truck for the external explosives charge; a preparation jig for the orderly arrangement of the packs of explosives and packs of sand which make up the external explosives charge; an external charge application jig for applying the external charge to the bell end; a belling machine; a bell end preparation machine; a spigot end preparation machine; four sideboom tractors, one each for the external charge application jig, the belling machine, the bell end preparation machine and the spigot end preparation machine.

11. The work in dispute, claimed by the Labourers, consists of:

- (1) taping the external surface of the bell end;
- (2) stringing the blast wires in or on the pipe for the spigot end and bell end explosives charges;
- (3) loading explosives into and unloading explosives from the powder magazine and maintaining the magazine;
- (4) transferring explosives from the powder magazine truck to the explosives preparation trucks;

- (5) placing and securing the packs of explosives and sand in the required position on the external charge preparation jig;
- (6) transferring the completed external explosives charge from its preparation jig onto the application jig while it is suspended from the boom of the sideboom tractor at the rear of the explosives preparation truck;
- (7) placing and securing the external charge application jig in position around the outside surface of the bell end, releasing the explosives charge onto the external surface of the bell end, securing the charge and releasing and removing the empty jig from the pipe end;
- (8) transporting the empty jig to the external charge preparation truck;
- (9) the work of a second person, when needed, to assist with positioning onto the pipe ends the bell end and the bell end and spigot end preparation machines; and
- (10) operating the bell end and spigot end preparation machines if they are used for any purpose other than the final polishing and calibration of the pipe-end surfaces before application of the tape and explosives charges.

12. The work not in dispute consists of:

- (1) operating the sideboom tractors;
- (2) driving the explosives truck and the two explosives preparation trucks;
- (3) positioning and operating the bell end machine, except as noted in item (9) above; and
- (4) positioning the bell end and spigot end preparation machines when it is done by one person and operating them when they are used for the final polishing and calibrating of the pipe end surfaces before applying the tape and explosives charges.

13. The work in dispute was performed on the Project by members of the pipefitters' trade represented by the UA or by persons who were neither members of that trade nor represented by the UA and were not construction labourers represented by the Labourers. That work included the operation of the two end preparation machines for removing mill scale, rust, dirt and any protective coating from the external surfaces of the ends of each pipe length being joined. That is the work which the machines were designed to perform and is the work which is in dispute with respect to the two machines. There is no evidence that they were intended to be used for any other purpose. The uncontradicted evidence before the Board is that they were not used on the Project for calibrating the pipe end surfaces or final polishing of the prepared surfaces.

14. Work which *was* part of the pipe joining operation, as described by Istvanffy, was all work which had to be done or was best done in the cycle between each detonation. Since the pipe joining operation determines the progress of the line, it was important to limit to the extent practi-

cal the work to be done in this pipe joining cycle. The work components involved in the pipe joining operation consisted of preparing the explosives charge which encircles the inside of the spigot end of the pipe, hence the internal charge, in the explosives preparation truck; transferring the charge to the internal charge application jig; transporting the internal charge explosives application jig from the preparation truck located approximately 5 or 6 pipe lengths behind the joining operation to the spigot end of the pipe; placing the explosives around the inside of the spigot end of the pipe; bringing the next pipe length to be joined (this is a pipe length with the external charge already attached to its bell end) to a position in line with and approximately two feet from the pipe end to which it is to be joined; the final wiping of the pipe ends with a solvent immediately prior to their mating; the final wiring of the explosives charges on the two pipe ends being joined; mating the pipe ends by bringing the bell end of the newest pipe length over the spigot end of the last one joined; and detonating the explosives charges.

15. The equipment used in the pipe joining operation included an explosives preparation truck for the internal charge; an internal charge preparation jig; an internal charge application jig; a sideboom tractor for transporting the internal charge application jig between the preparation truck and the spigot end of the pipe line; a sideboom tractor for transporting the pipe length being joined to the end of the pipe line and supporting the pipe length during the blast; a detonating device; and, a portable blast shelter.

16. The work in dispute, claimed by the Labourers, consists of:

- (1) placing and securing the packs of explosives and sand in the required position on the internal charge preparation jig;
- (2) transferring the completed internal charge from its preparation jig onto the application jig while it is suspended from the boom of the sideboom tractor at the rear of the internal charge preparation truck;
- (3) transporting the internal charge application jig from the preparation truck to the spigot end;
- (4) placing and securing the jig into position in the spigot end of the pipe, placing and securing the explosives charge onto the internal surface of the pipe end, and releasing the empty jig from the pipe end;
- (5) transporting the empty jig to the internal charge preparation truck;
- (6) final wiping of the finished surfaces of the two pipe ends being joined;
- (7) final wiring of the explosives charges on both pipe ends in preparation for detonation, including running the blast wires from the charges to the junction box, connecting them to the box, connecting the junction box to the detonating device with a high voltage wire, and detonating the charges.

17. The work not in dispute consists of:

- (1) operating the sideboom tractor during the pipe carry-back operation;
- (2) operating the sideboom tractor which transports the internal charge

application jig between the preparation truck and the spigot end of the pipe;

- (3) guiding during the pipe carry-back operation the pipe length being joined to the line;
- (4) mating the pipe ends; and
- (5) building the cribbing which supports the new spigot end of the pipe after joining.

18. The work in dispute was performed on the Project by members of the pipefitters trade represented by the UA or by persons who were neither members of that trade nor represented by the UA and were not construction labourers represented by the Labourers. A professionally qualified explosives specialist, one of several advisors and technicians contracted for by Premier from the licensor of the Process, operated the detonating device. The same person also was responsible for securing the blast site prior to the blast and signalling that it was safe to return to work after the blast.

19. In summary, all of the following work is in dispute:

- (1) the work of a second person, when needed, to assist with the positioning onto the pipe ends of the belling machine and the spigot end and bell end preparation machines;
- (2) placing and operating the spigot end and bell end preparation machines to remove mill scale, rust, dirt and any protective coating from the external surface of the spigot end and from the internal surface of the bell end and for any purpose other than the final polishing and calibration of the pipe-end surfaces before application of the tape and explosives charges;
- (3) taping the external surfaces of the pipe ends;
- (4) stringing the blast wires in or on the pipe for the spigot end and bell end explosives charges;
- (5) loading explosives into and unloading explosives from the powder magazine and maintaining the magazine;
- (6) transferring explosives from the powder magazine truck to the explosives preparation trucks;
- (7) placing and securing the packs of explosives and sand in the required position on the explosives preparation jigs;
- (8) transferring the completed external and internal explosives charges from their respective preparation jigs onto their respective application jigs while the latter jigs are suspended from the boom of the sideboom tractor at the rear of the explosives preparation trucks;
- (9) transporting the internal and external charge application jigs from their preparation trucks to the pipe ends;

- (10) placing and securing the application jig in position around the inside and outside surfaces of the pipe ends, releasing and securing the explosives charges onto the appropriate surface of the pipe ends and releasing and removing the empty jigs from the pipe ends;
- (11) transporting the empty application jigs to their preparation trucks;
- (12) final wiping of the finished surfaces of the two pipe ends being joined;
- (13) final wiring of the explosives charges on both pipe ends in preparation for detonation, including running the blast wires from the charges to the junction box and connecting them to the box, connecting the junction box to the detonating device with a high voltage wire, and detonating the charges.

20. When the inventors were developing the Process, in order for a work function to be performed in the field, it had to be a necessary function which could not be done better elsewhere. Each component work function which had to be performed in the field was designed to be as simple as possible so that it could be learned quickly with a minimal amount of training, at the same time keeping to a minimal level the number of persons necessary to make the Process function. For example, on the Project, proficient operation of the bell machine was gained in a half day. Learning how to perform the various component tasks of the Process was a matter of hours or days compared with months or years to become proficient in some trades. In the case of tasks which were most critical to the quality of the join, the significant skill factor was the knowledge to recognize when it had been done incorrectly and of the consequences of its not being done correctly. That fact is reflected in the special equipment employed in the Process, such as the end preparation machines and the explosives jigs which have been designed to require a minimal manual skill component for their operation. The types of explosives used, one for the internal charge and another for the external charge, are less sensitive, for example, than dynamite used for the excavation of rock, so that the explosives can be mechanically handled. They are factory prepared as are the sand packs used with them. Their correct arrangement in relation to one another is obtained mechanically by the preparation jigs, and their correct positioning in and on the pipe ends is obtained mechanically by the application jigs. As a result, none of the component tasks, whether taken individually or in any combination relative to the way they were performed on the Project, requires the level of manual skill and trade knowledge commonly associated with skilled construction trades. The most important skill components for most of the tasks is taking care in performing a task, knowing when it has been done correctly and being aware of the consequences of not doing it correctly. For example, a distorted pipe join would be the likely result if the correct four and one-half inches overlap was not achieved on the mating of the two pipe ends, or if the internal charge was not correctly placed, or if the charge was moved during the mating of the pipe ends. So the critical skill factor in those tasks is the ability to recognize whether they have been done correctly.

21. Skill and training, however, is but one of several criteria the Board usually assesses when it is adjudicating competing work assignment claims under section 91 of the Act. Others are collective bargaining relationships, economy and efficiency, area practice, employer practice and employer preference. The Board has considered also the criterion of job loss in a few cases. These have been limited largely to the newspaper and printing industries. See the Board's decision in *Toronto Star Newspapers Limited*, [1980] OLRB Rep. April 565, at paragraph 22 and the cases referred to therein. Counsel for the UA argued that job loss was a relevant and appropriate crite-

tion in this case because of the substantial reduction in the number of employees represented by the UA who would be required on a pipe line project where the Process can be utilized as a result of the need for welding being eliminated from the pipe joining process. The Board disagrees. Job loss for the members of the trade union parties to a work assignment dispute has not been, by itself, a factor considered by the Board in deciding the merits of the competing claims for the work in dispute. See, for example, the decisions referred to in the *Toronto Star* decision, *supra*. The kinds of circumstances which have led the Board to consider job loss are not present here. Moreover, the Labourers union has borne the adverse impact on the jobs of its members from prior new technology in pipe line construction. Therefore, were the Board to consider job loss outside of special circumstances like those which existed in the *Toronto Star* case, in order for the criterion to be equitably applied, the Board would have to look at the historical impact of change on job loss. While that kind of evidence may be available in more stable employment relationships characteristic of industrial employment, it likely would not be readily available in the transitory and more cyclical employment relationships characteristic of construction employment. In addition, new technology may erode or eliminate the basis for the existence of a particular craft or trade. When that occurs, it is not the function of section 91 of the Act to preserve that basis. The risk of doing so would be an inherent element of the Board weighing job loss in a work assignment dispute. The Board should not be too quick to adopt any criterion which would have the effect of preserving a particular craft or group of employees when the basis for the existence of the craft or group of employees has been eroded or disappears. In that respect, see *Joseph Brant Memorial Hospital*, [1981] OLRB Rep. Nov. 1598. For these reasons, the Board declines to apply a criterion of job loss in the circumstances of this case.

22. The Board agrees also with Labourers' counsel that the employer preference criterion would not be appropriate in this case. This is because, apart from evidence that there is a letter of understanding between the UA and the Association, which purports to prescribe certain minimum manning levels of UA classifications for the work at issue, the Board has no evidence before it as to the basis of Premier's preference for assigning the disputed work to the UA. Nor is there evidence either of any beneficial impact on the economy and efficiency of Premier's construction operations on the Project from the assignment of the work to the UA, or of any adverse impact from assigning it to the Labourers.

23. Since the Project is the first application of the Process to the construction of an operating pipe line, there is no evidence respecting employer past practice under actual pipe line construction conditions. The Board does have evidence about the making of trial joints in isolation of actual pipe line conditions. While this trial or experiment employed members of both trade unions, it is of limited value to the Board in deciding this dispute. The Board does have before it, however, evidence of past practice about work performed on a traditional pipe line spread. The evidence is in the nature of industry practice within the Province of Ontario and does not specifically relate to Premier's past practice. Therefore, other than the evidence about the making of the trial joints, there is no evidence of employer past practice.

24. Counsel for the Labourers contends also that the Board cannot consider economy and efficiency in the circumstances of this case. This, according to counsel, is because this criterion must be considered in the context of the economic organization of the employer from whom the disputing trade unions are seeking the assignment of the work. Therefore, since Premier did not participate in the hearing on the merits to give that evidence, the Board cannot consider the factor of economy and efficiency. Counsel relies on *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185 and *Boise Cascade Canada Ltd.*, [1983] OLRB Rep. Feb. 194. With respect, the Board disagrees with counsel. Whether or not *K-Line* stands for the principle that economy and efficiency should not be considered in the abstract, as counsel asserts, the Board

agrees that it should not be applied in the abstract. However, the Board does not read those decisions as preventing it from considering economy and efficiency when it has a factual basis for doing so. In the instant case, the factual basis is the substantial, detailed evidence of how Premier organized and performed the work in dispute, regardless of which trade did or did not perform it.

25. Therefore, in all of the circumstances of this complaint, the Board will consider the following criteria: collective bargaining relationships, skill and training, economy and efficiency and area past practice, the latter criterion relating to past practice on traditional pipe line construction.

26. Labourers' counsel argues that, when the Board is dealing with technological change where a newer technology replaces an older one, the Board should ignore the finished product or the particular use to be made of the finished product and look to the nature of the work done by employees in each trade and relate that to the work required to be performed in applying the new technology. Counsel relies on the Board's decision in *Toronto Star Newspapers Limited*, [1980] OLRB Rep. April 565, the cases cited therein at paragraphs 13 and 14 and the Board's comments at paragraph 19:

19. We accept the conclusion reached in both *Pacific Press, supra*, and *La Presse, supra*, that the Board must look to the nature of the work done by the employees and not the use made by the employer of the end product of the work in dispute. If the end product was to be cast as a primary criterion the result would be to downgrade the importance of skills and ability, and efficiency, as primary criteria. Clearly the skills associated with performing a work process and the efficiency with which it is performed are interrelated factors. A craft union is one whose members "are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or craft." When called upon to resolve competing work claims between craft unions the Board must look to the work and determine if the skills of one of the crafts are more closely related to the nature of the work in dispute and whether or not the use of these skills by persons trained in the craft will have a bearing on efficiency and economy. If we were to restrict ourselves to the end product these considerations, which must be central to the resolution of any jurisdictional dispute, would become irrelevant.

The Board herein does not disagree with that approach but notes that it affects only the criterion of skill and ability and the potential impact of that criterion on economy and efficiency. As important as those factors often are in jurisdictional disputes, the process of resolving such disputes involves a weighing of all relevant criteria and deciding whether they weigh more in favour of one trade than the other.

27. In addition to the *viva voce* and documentary evidence dealing with the Process and the work in dispute, the Board received *viva voce* and documentary evidence relating to the various criteria. The Board has reviewed and weighed the evidence having regard to the Board's assessment of the credibility of the witnesses and the submissions of the parties on the weight to be given to the evidence in considering each of the criteria. While the Board is not going to set out the evidence in detail or summary, it has assessed the evidence relative to its consideration of the criteria and, where necessary, will discuss particular relevant elements of the evidence in considering the various criteria.

Collective Bargaining Relationships

28. Premier is bound to the Mainline Pipe Line Agreement for Canada between the Association and each of the Labourers and the UA. It is bound also to the Association's Mainline Pipe Line Agreement for Canada with each of the Operating Engineers and Teamsters unions. Their work is not in dispute in this complaint. Neither the Labourers nor the UA collective agreement claims jurisdiction over the Process or contains any specific reference to it or to any pipe joining

method which reasonably could be likened to the Process. The UA agreement, paragraph D, Article II - Scope of Work, does claim jurisdiction for "...the making of joints by any mode or method...". The fuller context of the claim is:

"..."

The work of preparing the pipe for welding, all welding and lining up of the pipe, handling the clamps and the making of joints by any mode or method is recognized as the jurisdiction of the [UA] and the employees assigned to such work shall be Journeymen, Graded Helpers, or Welders Helpers, depending on the work involved."

Article XV - Special Work, contains repeated claims that "...the making of joints is the work of the [UA]...". Paragraph M of the article states in part "If the pipe is made of material other than steel, and no welding is required to be done, ...it is recognized that...the making of joints is the work of the [UA]...". The evidence of Gordon Hodson, retired executive director of the Association, is that, for years, the UA's jurisdiction under its collective agreement with the Association over the making of the joints by any mode or method has been asserted consistently by the UA and recognized by the Association and its members.

29. While neither collective agreement claims jurisdiction over the Process or contains any specific reference to it, during the negotiation of the 1983-85 collective agreement under which the disputed work was performed, the UA and Association negotiated and exchanged a letter of understanding dated May 31, 1983, which purports to establish new job classifications and minimum manning levels for them for the Process. According to Gordon Hodson, executive director of the Association at the time and a member of its bargaining team, the Association was obligated to respond to a proposal from the UA to negotiate terms respecting the Process for two reasons. First, because the collective agreement between them recognizes the UA's claim to "...the making of joints by any mode or method...". Second, because paragraph C of Article II requires the parties to negotiate about technological change upon notice from either party when changes result "...in a requirement for classifications or special conditions within the jurisdiction of the [UA] not provided for [in the UA/Association collective agreement]...". Labourers' counsel argues that the letter should be disregarded by the Board because it is not part of the collective agreement and, in any event, parties were negotiating about the work jurisdiction of another trade (construction labourers) under a threat from the UA to take the issue to impasse; i.e. to strike the contractors over the issue. Counsel argues that Board jurisprudence establishes that it is contrary to the scheme of the *Labour Relations Act*, particularly section 15, to attempt to use economic sanctions or the immediate threat of economic sanctions in order to force a contractual settlement which compromises the work jurisdiction of another trade union. Counsel cites as authority the Board's decision in *Toronto Star Newspapers Limited*, [1979] OLRB Rep. Aug. 811, particularly paragraph 15 (*Toronto Star #2*). The instant case is readily distinguishable on its facts, particularly the absence of any evidence from which the Board reasonably could conclude that the UA and the Association reached impasse in their bargaining at all, let alone reached impasse over the demands which Labourers' counsel says would be unlawful to take to impasse. With respect to counsel's argument that the letter was not part of the collective agreement, it is simply without merit. The letter clearly was the product of the collective bargaining relationship between the UA and the Association and intended to influence their collective bargaining relationship respecting the Process.

30. Accordingly, the criterion of collective bargaining relationships supports an assignment to members of the UA of the work of making joints using the High Impact Welding process. Counsel for the Labourers argues that, where the Process is the method used for the making of the joint, the UA's claim is limited to the work which comprises the pipe joining cycle described generally at paragraph 14. The Board disagrees. Clearly the responsibility for the making of the joint should

include work which would directly affect the quality of the joint, whether or not it is part of the pipe joining cycle. Istvanffy's evidence clearly establishes that the determining factor for making any work function part of the pipe joining cycle was whether it had to be done or was best done in between each detonation. This was because the lapse of time between each detonation was the critical time factor controlling the progress of the line. It is clear also from his *viva voce* evidence and from a fair reading of the description of the Process in the "High Impact Welding Manual", which is Exhibit 9 in this proceeding, that work which is not part of the pipe joining cycle is still essential to the making of a good join. Furthermore, experience in applying the Process may result in the shift of work components between the two phases. Therefore, to hold that "the making of the joint" was only the work done as part of the pipe joining cycle of the Process would be an artificial circumscription of "the making of the joint". In the Board's view, the making of the joint includes all work directly involved with the work in dispute summarized at paragraph 19 above, *except*:

- (4) stringing the blast wires in or on the pipe for the spigot end and bell end explosives charges;
- (5) loading explosives into and unloading explosives from the powder magazine and maintaining the magazine;
- (6) transferring explosives from the powder magazine truck to the explosives preparation trucks.

Skill and Training

31. The evidence establishes conclusively that the work components of the Process have been designed to minimize the manual skills required to carry out each work function. According to Istvanffy, each component work function which needed to be performed in the field was designed to be as simple as possible so that it could be learned as quickly as possible with a minimal amount of training while keeping the number of persons needed for performing the work at the minimal level necessary to make the Process function. In reply, he testified that one of the objectives in designing the Process was to remove skill elements which are difficult to perform under field conditions on pipe line construction projects. As a result of this approach to the design of work functions, the various functions in the Process could be learned in the space of a few minutes, hours or days instead of the months and years associated with some of the skilled trades. Istvanffy gave some specific examples from the Project:

- (1) the operation of the belling machine could be learned in minutes and proficiency achieved in a half day; and
- (2) to learn to proficiently set and secure the explosives charges on the pipe ends took two to three days in the case of the external charge, and three to four days in the case of the internal charge.

32. Generally speaking, the criterion of skill and training does not favour either the Labourers or the UA because the skills required do not clearly relate to those of one trade and not the other. There are exceptions, however. Istvanffy repeatedly referred to the need for care in doing the simple components of a job and the "knowledge and judgement" to know when they have been done correctly or incorrectly and understanding the consequences which will flow from them not being done correctly. He gave several examples:

- (1) Inserting the internal explosives charge application jig into the spigot end so that each of the jig's depth lugs are placed against the end of

the pipe. If the pipe end is as little as a half inch out of place relative to the depth lugs, it would result in a distorted join. There is no opportunity once the pipe ends are placed in the mated position to check the placement.

- (2) Similarly, in placing the external charge, while the proper alignment of the packs of explosives and sand is achieved mechanically by the application jig, if they are not symmetrically placed around the circumference of the pipe, it could result in the incorrect depth placing of the charge. Again, the result would be a distorted join.
- (3) Making sure the end preparation machines have removed all mill scale, caked-on rust or any other foreign material or imperfection from the pipe ends so there is a uniformly, shiny surface identifiable by the absence of any “salt and pepper” appearance and by the presence of parallel scratches around the entire circumference of the pipe ends. If this end preparation is not done correctly, the join would not meet specifications.

The evidence also establishes that the blaster classification in the Labourers’ jurisdiction has the skill and training for the safe handling, setting and detonating of explosives. While the application of these skills in pipe line construction has been destructive blasting, for example, for the removal of rock from the pipe line trench, it is no less applicable to the use of explosives in the Process. The types of explosives used are less sensitive than dynamite to allow the mechanical handling of the explosives on the preparation and application jigs. They also produce less energy than dynamite. Nonetheless, Istvanffy emphasized the need for the persons involved directly with the handling, and detonation of the explosives, including the handling of blasting caps and operating the detonating device, to be skilled in their safe use for the safety of all persons in the area of their use.

33. Having regard to all of the foregoing, the Board finds that consideration of the criterion of skill and training strongly favours the assignment to Labourers of the following work, as listed in paragraph 19, to be done by or under the direction of a blaster under the Labourers’ work jurisdiction:

- (4) stringing the blast wires in or on the pipe for the spigot end and bell end explosive charges;
- (5) loading explosives into and unloading explosives from the powder magazine and maintaining the magazine;
- (6) transferring explosives from the powder magazine truck to the explosives preparation trucks;
- (7) placing and securing the packs of explosives and sand in the required position on the explosives preparation jigs;
- (8) transferring the completed external and internal explosives charges from their respective preparation jigs onto their respective application jigs while the latter jigs are suspended from the boom of the sideboom tractor at the rear of the explosives preparation trucks;

- (9) transporting the internal and external charge application jigs from their preparation trucks to the pipe ends;
- (10) placing and securing the application jig in position around the inside and outside surfaces of the pipe ends, releasing and securing the explosives charge onto the appropriate surface of the pipe ends and releasing and removing the empty jigs from the pipe ends;
- (13) final wiring of the explosives charges on both pipe ends in preparation for detonation, including running the blast wires from the charges to the junction box and connecting them to the box, connecting the junction box to the detonating device with a high voltage wire, and detonating the charges.

34. Having further regard to all of the foregoing, and to their responsibility for the making of the joint, the Board finds that consideration of the criterion of skill and training favours assignment to classifications coming within the UA's jurisdiction of the following work, as listed in paragraph 19:

- (1) the work of a second person, when needed, to assist with the positioning onto the pipe ends of the belling machine and the spigot end and bell end preparation machines;
- (2) placing and operating the spigot end and bell end preparation machines to remove mill scale, rust, dirt and any protective coating from the external surface of the spigot end and from the internal surface of the bell end and for any purpose other than the final polishing and calibration of the pipe-end surfaces before application of the tape and explosives charges;
- (3) taping the external surfaces of the pipe ends;
- (12) final wiping of the finished surfaces of the two pipe ends being joined.

Area Past Practice

35. This being a first application of the Process, there is no past practice evidence about it. The Board did hear a substantial amount of evidence and argument about an agreement between the Labourers International Union of North America and the United Association which purports to deal with pipe line construction. It was of no assistance to the Board in this case. The relevant evidence of past practice is limited to established work jurisdiction for the work processes which are part of traditional pipe line construction. The evidence consists of documentary and *viva voce* evidence describing work functions carried out by 24 crews on a traditional pipe line spread. The documentary evidence is contained in the brief prepared by the pre-hearing vice-chair. Consideration of the criterion of area past practice in the context of practices on traditional pipe spreads favours assigning the following work to the Labourers:

- (1) the work of a second person, when needed, to assist with the positioning onto the pipe ends of the belling machine and the spigot end and bell end preparation machines;

- (3) taping the external surfaces of the pipe ends;
- (4) stringing the blast wires in or on the pipe for the spigot end and bell end explosives charges;
- (5) loading explosives into and unloading explosives from the powder magazine and maintaining the magazine;
- (6) transferring explosives from the powder magazine truck to the explosives preparation trucks;
- (7) placing and securing the packs of explosives and sand in the required position on the explosives preparation jigs;
- (8) transferring the completed external and internal explosives charges from their respective preparation jigs onto their respective application jigs while the latter jigs are suspended from the boom of the sideboom tractor at the rear of the explosives preparation trucks;
- (9) transporting the internal and external charge application jigs from their preparation trucks to the pipe ends;
- (10) placing and securing the application jig in position around the inside and outside surfaces of the pipe ends, releasing and securing the explosives charge onto the appropriate surface of the pipe ends and releasing and removing the empty jigs from the pipe ends;
- (11) transporting the empty application jigs to their preparation trucks;
- (13) final wiring of the explosives charges on both pipe ends in preparation for detonation, including running the blast wires from the charges to the junction box and connecting them to the box, connecting the junction box to the detonating device with a high voltage wire, and detonating the charges;

and the following work to the UA:

- (2) placing and operating the spigot end and bell end preparation machines to remove mill scale, rust, dirt and any protective coating from the external surface of the spigot end and from the internal surface of the bell end and for any purpose other than the final polishing and calibration of the pipe-end surfaces before application of the tape and explosives charges;
- (12) final wiping of the finished surfaces of the two pipe ends being joined.

Economy and Efficiency

36. The Board has stated earlier in this decision that it would consider this criterion within the factual context of how Premier organized the work on the Project. The Board has also said in *FDV Construction Limited*, an unreported decision of the Board which issued October 29, 1982, that, when considering this criterion, it should be weighed in the wider context of the employer's

operations. The Board herein considers it appropriate to consider the criterion of economy and efficiency in this case in the context of how the Process was applied on the Project and not solely within the narrow context of the detailed elements of each work function in dispute. As the Board noted earlier, the pre-hearing brief described the work in dispute with minute detail, with which the parties agreed with minor exceptions. While this may have assisted the parties in relating the work processes involved with established tasks on a traditional pipe line spread to those involved with the Process, the effect of the detail has been to obscure the integrity and homogeneity of each of the work tasks and how they were performed on the Project. This effect was apparent throughout much of the examination of Istvanffy. Therefore, where a simple element like connecting or disconnecting a compressed air hose, or turning a handle which opens a pressure valve on one of the explosives application jigs is an essential part of a larger task, even if it can be related to the established work jurisdiction of either trade on a traditional pipe line spread, if assigning it to that trade would interfere with the integrity of the larger work task of which it is a part, the criterion of economy and efficiency would favour maintaining the integrity of the larger work task.

37. Having regard to the foregoing, consideration of the criterion of economy and efficiency favours assigning the following work in dispute, as listed in paragraph 19, to employees in classifications represented by the UA:

- (1) The work of a second person, when needed, to assist with the positioning of the belling machine on the pipe end. The operation of the belling machine is the undisputed jurisdiction of the UA. If the operator requires the assistance of a second person to position the machine, assigning the work to another UA classification, a helper for example, would reasonably be a more flexible arrangement than assigning it to a different trade.
- (2) Taping the external surface of the spigot end of the pipe. The tape is applied immediately prior to the mating of the two pipe ends and just before the inside charge is placed in the pipe end. At this point in the joining cycle, the two spacers are preparing for the final line-up and mating of the pipe. That work is the undisputed jurisdiction of the UA. They are free at that point to apply the tape before the internal charge is applied to the spigot end. The only other person at the joining process is the one performing the function of blaster. As the work was performed on the Project, that person walked the application jig from the preparation truck to the pipe. The tape should already have been applied before the jig arrives. Therefore, even if that work is assigned to the Labourers, it would be necessary to inject another person into that part of the Process or to delay the joining cycle if the spacers do not do the taping. Therefore it would be more efficient to assign the taping of the spigot end to the UA.
- (3) The final wiping of the finished surfaces of the two pipe ends being joined. This work is done immediately prior to the mating of the pipe ends. Whether the final wiring of the explosives charges on both pipe ends is assigned to the Labourers or the UA, the final wiping is being done approximately at the same time as the wiring. Therefore, were the final wiping to be assigned to the Labourers, it would mean adding another person to, or delaying that part of the Process. It is clearly more efficient to assign the final wiping to the UA.

The same reasons as given in item (1) above for the consideration of economy and efficiency favouring assigning the work of the second person on the belling machine to the UA, would apply if the work of a second person is needed in positioning the bell and spigot end preparation machines. That is, it would give Premier more flexibility if that work were to be assigned to the same trade to which the operation of the machines is assigned.

38. Consideration by the Board of the criteria referred to above leads it to the following conclusions respecting the work in dispute. The criteria of collective bargaining relationships, skill and training, and area past practice overwhelmingly favours assigning to the Labourers the following work as listed in paragraph 19:

- (4) stringing the blast wires in or on the pipe for the spigot end and bell end explosives charges;
- (5) loading explosives into and unloading explosives from the powder magazine and maintaining the magazine;
- (6) transferring explosives from the powder magazine truck to the explosives preparation trucks.

In addition, the criteria of skill and training and area past practice strongly favour also assigning to the Labourers the following work as listed in paragraph 19:

- (7) placing and securing the packs of explosives and sand in the required position on the explosives preparation jigs;
- (8) transferring the completed external and internal explosives charges from their respective preparation jigs onto their respective application jigs while the latter jigs are suspended from the boom of the sideboom tractor at the rear of the explosives preparation trucks;
- (9) transporting the internal and external charge application jigs from their preparation trucks to the pipe ends;
- (13) final wiring of the explosive charges on both pipe ends in preparation for detonation, including running the blast wires from the charges to the junction box and connecting them to the box, connecting the junction box to the detonating device with a high voltage wire, and detonating the charges.

While those criteria would seem to favour assigning the following work to the Labourers as well:

- (10) placing and securing the application jig in position around the inside and outside surfaces of the pipe ends, releasing and securing the explosives charge onto the appropriate surface of the pipe ends and releasing and removing the empty jigs from the pipe ends,

for reasons given below, the Board is of the view that it should be assigned to the UA.

39. The criteria of collective bargaining relationships, skill and training, and economy and efficiency strongly favour assigning to the UA the following work listed in paragraph 19:

- (2) placing and operating the spigot end and bell end preparation

machines to remove mill scale, rust, dirt and any protective coating from the external surface of the spigot end and from the internal surface of the bell end and for any purpose other than the final polishing and calibration of the pipe-end surfaces before application of the tape and explosive charges;

- (3) taping the external surfaces of the pipe ends;
- (12) final wiping of the finished surfaces of the two pipe ends being joined,

as do the criteria of collective bargaining relationships, skill and training, and economy and efficiency with respect to:

- (1) the work of a second person, when needed, to assist with the positioning onto the pipe ends of the belling machine and the spigot end and bell end preparation machines.

With respect to the work of placing and securing the application jig in position around the inside and outside surfaces of the pipe ends, releasing and securing the explosives charge onto the appropriate surface of the pipe ends and releasing and removing the empty jigs from the pipe ends, it is so integral to the responsibility of the classifications under UA jurisdiction for the making of the join that it should be assigned to them. The evidence is unequivocal that, if the external and internal charges are not correctly positioned at the time of the detonation, the result will be a distorted join of unacceptable quality. Since the UA classifications are responsible for the making of the join, they bear the responsibility for the final quality of the join. Therefore, it is imperative that they have control of the function of placing and securing the external and internal charges. Insofar as the safety aspect of placing and securing the charges is concerned, it is open to Premier to have the blaster who is present at the pipe supervise the placing and securing function.

40. The complaint as filed requested as relief that the Board direct:

- (1) Premier to assign all of the work in dispute at the Project to members of the Labourers International Union of North America, Local 607; and
- (2) all employer members of the Association to assign the work in dispute throughout the Province of Ontario to members of the Labourers International Union of North America.

The second direction was not addressed in final argument. In any event, in all of the circumstances of this case, the Board will follow its usual practice and limit its direction to Premier's 6.2 km. Trans Canada Pipelines Gas Mainline Project "Line 100-3".

41. Having regard to all of the foregoing and pursuant to section 91 of the *Labour Relations Act*, the Board directs that Premier Pipelines Limited and/or Premier Lilley Resources assign to members of the Labourers International Union of North America and its Local 607 and to members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and its Local 628, respectively, the following work directly involved with the High Impact Welding process on the 6.2 km. Trans Canada Pipelines Gas Mainline Project "Line 100-3":

I To classifications within the jurisdiction of The Labourers International Union of North America and its Local 607:

- (1) stringing the blast wires in or on the pipe for the spigot end and bell end explosives charges;
- (2) loading explosives into and unloading explosives from the powder magazine and maintaining the magazine;
- (3) transferring explosives from the powder magazine truck to the explosives preparation trucks;
- (4) placing and securing the packs of explosives and sand in the required position on the explosives preparation jigs;
- (5) transferring the completed external and internal explosives charges from their respective preparation jigs onto their respective application jigs while the latter jigs are suspended from the boom of the sideboom tractor at the rear of the explosives preparation trucks;
- (6) transporting the internal and external charge application jigs from their preparation trucks to the pipe ends;
- (7) transporting the empty application jigs to their preparation trucks;
- (8) final wiring of the explosives charges on both pipe ends in preparation for detonation, including running the blast wires from the charges to the junction box and connecting them to the box, connecting the junction box to the detonating device with a high voltage wire, and detonating the charges.

II To classifications within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and its Local 628:

- (1) the work of a second person, when needed, to assist with the positioning onto the pipe ends of the belling machine and the spigot end and bell end preparation machines;
- (2) placing and operating the spigot end and bell end preparation machines to remove mill scale, rust, dirt and any protective coating from the external surface of the spigot end and from the internal surface of the bell end and for any purpose other than the final polishing and calibration of the pipe-end surfaces before application of the tape and explosives charges;
- (3) taping the external surfaces of the pipe ends;
- (4) placing and securing the application jig in position around the inside and outside surfaces of the pipe ends, releasing and securing the explosives charge onto the appropriate surface of the pipe ends and releasing and removing the empty jigs from the pipe ends;

- (5) final wiping of the finished surfaces of the two pipe ends being joined.

42. The foregoing assignments are made subject to the following conditions:

- (1) The evidence before the Board was that the work described at item (11) of paragraph 19, that is: transporting the empty application jigs to their preparation trucks, was performed by the sideboom without the application jig being guided by anyone on the ground. Since the work was not being performed, the Board's assignment is not to be taken as requiring Premier to assign someone to do the work. If, however, Premier determines that the application jigs require someone on the ground to guide them as they are returned to the truck, that work is to be assigned to the Labourers.
 - (2) The detailed description of the work in dispute in the pre-hearing brief included references to handling the load line and hooking and unhooking it from the pieces of equipment used to perform the work. The evidence is that hooking on was done only when each piece of equipment was first attached to the load line of the sideboom tractor dedicated to the equipment and was performed either by the sideboom operator or the employee who operated the equipment. At that same time, each piece of equipment was fastened to the stiff arm of the sideboom tractor and remained so attached when the equipment was being operated, except for the bell end preparation machine. It was necessary to detach it from the stiff arm while it was being operated to prepare the surface of the pipe end re-attach it after that operation. For reasons of economy and efficiency, the Board has included that work in the assignment of the broader task of which it is a part. This is without prejudice to the Labourers' claimed jurisdiction over handling the load line of hoisting equipment when it is used to hoist equipment other than that which is in dispute herein.
 - (3) The Board's directions are not to be taken as interfering or altering the traditional work functions of the classifications coming within the jurisdiction of the Operating Engineers and Teamsters unions.
 - (4) The directions are made without reference to the number of persons required to perform the work in dispute and, except where they refer to a specific classification, the directions are not intended to be determinative of the classification within the particular trade which is to perform the work.
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0181-87-U Great Lakes Fishermen and Allied Workers' Union, Complainant v. Saco Fisheries Limited, Respondent

Practice and Procedure - Remedies - Unfair Labour Practice - Deviation from a usual pattern of seasonal hiring of fishing boat crew resulting in a failure to rehire persons who would normally have a reasonable expectation of being rehired - Board prepared to find a portion of a section that has not been pleaded by a party has been contravened if the evidence supports such a finding - Employer found to have discriminated against the fishermen - Change in hiring practice was a response to the union's attempts to organize - Reinstatement not ordered - Compensation awarded for two fishing seasons

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. M. Sloan* and *A. HersHKovitz*.

APPEARANCES: *M. Darnell* for the complainant; *R. G. McLister* and *Adriano Codinha* for the respondent.

DECISION OF PATRICIA HUGHES, VICE-CHAIR AND BOARD MEMBER A. HERSHKOVITZ; October 25, 1988

I Background

1. During the late 1960's and early 1970's, Portuguese fishermen began to settle around the ports of Leamington, Kingsville, Wheatley and other centres on the Great Lakes, replacing the deckhands who had been driven by the low prices then characteristic in the fishing industry into the automobile manufacturing industry in the Windsor area. Many of these fishermen, who now dominate the industry, enjoy a shared history, perhaps having fought together in Angola, fished with the Portuguese fishing fleet on the Grand Banks off Newfoundland, or simply having come from the same village, in particular for our purposes, from the fishing village of Nazare. Some of the fishermen originally arrived in Canada by way of a "labour contract" under which they would work for the fishery owner who sponsored the contract for a year, after which time they would ask the owner if he had work for them the next year and if so, to sponsor them under other one year labour contracts; eventually, they might come to Canada as landed immigrants, a route taken by other fishermen in the first place. The social, cultural and economic lives of many of these transplanted Nazareans are bound by the parameters of the local community (in our case, Leamington); they speak little English, congregate in the Portuguese coffee shops and hotel, and rarely venture into the society beyond. The family network is strong: sons follow their fathers onto the boats; the wives of the fishermen work as net repairers or in the processing plants; the wives of the owners may work in the office; a boat crew may be at least partially composed of the owner's sons, cousins, nephews or brothers-in-law, by blood or by marriage, or by the sons of the owner's good friends from Portugal.

2. Until recently, crews caught as much fish as they were capable of doing and operated until the weather prohibited it or until prices went down. In February 1984, the Ontario Ministry of Natural Resources instituted "quotas" which limited the amount and type of fish caught to that permitted by a licence issued by the MNR. The dynamics of the industry shifted, with the skill required being directed to the management of the quotas allocated to a fishery in order to realize their maximum value, instead of towards catching the most fish. Owners and crew have both been affected by the quota system. Some companies have gone out of business and smaller ones have sold out to larger ones. There are fewer boats fishing the Lakes, in part because it is more efficient for a single boat to carry more than one licence than to assign one licence to one boat, and consoli-

dation, the grouping of licences on fewer boats, is increasingly prevalent. A fishery's value lies in its licences, not in its boats, and it is extremely difficult to sell a boat without a licence. While there are fewer crew working on the Lakes, income has increased and turnover decreased for the deckhands who remain.

3. Saco Fisheries Limited ("Saco" or "the company"), the respondent in this matter, through the foresight and business acumen of its owner, Adriano Codinha, has taken advantage of the new system. Saco has been consolidating its operations since shortly before the advent of quotas, reducing the number of boats it operates, while increasing the number of licences it fishes (the licences are owned by individual members of Mr. Codinha's family, not by the company). At the beginning of 1983, Saco owned seven boats fishing seven licences; by 1986, it operated three boats with three licences each, a total of nine licences (one of the boats, the "Jorge B.", tragically sank with the loss of three crew in September 1983; the other boats were sold). The licences may be fished by Saco boats or "leased" out to other fisheries for a percentage of the value; Saco also leases licences from other fisheries (for example, to fish smelt after its own quotas have been exhausted before lake freezes).

4. In April 1986, some of the fishermen on Lake Erie decided they wanted to organize into a union, specifically the Great Lakes Fishermen and Allied Workers' Union ("the union"), the applicant in this case. Among them were the grievors: Joao Bulhoes, Armindo Ferreira, Paulo Guerra, Antonio Inacio, Cipriano Pilo, Antonio Poupada, and Julio Verrissimo. The approximately 25 applications for certification filed with the Board in the summer of 1986 indicate the community-wide basis of the organizing campaign. The union filed two applications for certification as the bargaining agent of the boat crews at Saco, one in July 1986 and the second in September 1986. Both were unsuccessful: the July application was dismissed by the Board by decision dated September 4, 1986 (see Board File No. 1277-86-R) and the September application was dismissed October 20, 1986 (see Board File No. 1844-86-R).

5. Much of the evidence adduced in the approximately thirty days of hearing in this case concerned the state of affairs in the Leamington-Wheatley area during the period of union organizing and subsequently. For example, we heard about threats made by the original union organizer, Domingos Belo, now disowned by the union and many of its members, who eventually left the area, but not, it seems, before his conduct had led to hostility and animosity and, in some cases, violence, between union supporters and those opposing the union. From that period, there were also threats against Mr. Codinha and marches on his house. We see no need to detail this evidence, except as specifically relevant to the issues we must determine. But we conclude that the atmosphere created during this early period changed the relationships of family member to family member, friend to friend, and most significantly, from our point of view, the relationship between Mr. Codinha and at least certain of his employees. Indeed, it was clear from events which occurred during the hearing or about which we were informed by the representative for the union and counsel for Saco that the hostility continues today. It is against this tense background that the events in this case unfold.

6. As indicated, in 1986 Saco operated three fishing boats: the "A. Poupada", the "Isabel Maria" and the "Miss Nicole" (at one time called the "A.B. Hoover"). When the "regular" season began in March 1987, only two Saco boats went out fishing; the "Miss Nicole" had been put in dry dock at the end of the previous season and was for sale (by the end of the hearing into this matter, it had been sold). As a result, fewer crew members were required. The seven grievors in this complaint fished for Saco in 1986 and for varying periods prior to that, but did not fish in 1987. They claim that the reason they are not fishing for Saco is that they are supporters of the union and they alleged originally that Saco has, by not "recalling" them for the 1987 season, contravened sec-

tions 66 and 70 of the *Labour Relations Act* (“the Act”). Saco responds that there was a good business reason for fishing only two boats in 1987, instead of three, and that therefore the reduction in crew requirements is motivated by a legitimate purpose and that, furthermore, the fact that these seven men were not working for Saco again in 1987 is simply the result of their not asking for a job, or (in two or three cases), asking for a job until after the company already had a full crew complement.

7. Prior to dealing with the merits of the case, we briefly record our oral disposition of certain preliminary matters considered at the beginning of the hearing.

II Preliminary Matters

8. Counsel for the company objected to the union’s filing certain letters with its Complaint (he did not dispute that the letters were sent and received), as well as to reference in the Complaint to another Board file involving Saco, which had been settled. We ruled that a party wishing us to take notice of any of the contents of the letters would have to adduce the letters in evidence in the normal course. The earlier file referred to in the Complaint or any evidence adduced in that matter is not before us, and we ruled that we would not take it into consideration. We rejected Saco’s contention that the union does not have standing to file complaints under section 66 (or section 70) of the Act. The union brings the Complaint as agent for the grievors, not on its own behalf. We observe in this regard that Form 58, “Complaint under Section 89 of the Act” begins “The complainant complains that the grievor(s) named in paragraph 2 has (have) been dealt with by the respondent contrary to the provisions of section(s) ...” and that paragraph 2 following reads “(a) Names of grievor(s)”. These portions of the Form clearly contemplate that the union may act as the complainant on behalf of individual grievors. They were appropriately completed by the union which attached a Schedule of the grievors’ names to the Complaint.

9. Saco argued that since the grievors were terminated, they cannot bring a complaint against the company with respect to not being rehired because there was not an employment relationship. Furthermore, the company contends, although they might have brought a complaint alleging improper dismissal at the end of the 1986 season, it is now too late to do so, especially since some fishermen were hired in January 1987 and the grievors did not come forward then, either to ask for work or to complain. Nor, counsel for Saco added, does the Complaint allege that any of the grievors were actually refused work; if that is the allegation, counsel argued that he was entitled to particulars about when and where the refusal took place and by whom. The representative for the union submitted that it would have been premature for the union to file a complaint in November 1986, when the season ended, since the union’s position is that it is the failure to call the grievors to work in the spring of 1987 which contravenes the Act, not the “termination” or “lay-off” in the fall or winter of 1986. He submitted that the issue of whether the grievors applied for jobs should not be determined as a preliminary matter since whether they were required to do so is a major issue in the case. We ruled that under the circumstances, we are satisfied that the earliest point at which the grievors could have filed a complaint about not working for Saco in the 1987 season was early January 1987 when some fishermen, but not the grievors, went out fishing; the complaint was filed April 21, 1987, and therefore there is not undue delay even if that date (rather than the first week of March when the “regular” season began) is the appropriate one. As for whether the grievors were employees at the time the complaint was filed or at the same time the events giving rise to the complaint occurred, we ruled that we were not prepared to dismiss the Complaint on a preliminary objection on that basis since the employment status of the grievors vis-a-vis Saco is clearly a central issue in the case.

10. Counsel also stated that he was entitled to particulars about the intimidation and coer-

cion which the union alleged occurred contrary to section 70 of the Act. We directed that the union provide particulars with respect to the allegations under section 70. Counsel for the company objected with respect to the latter that they referred to events which had occurred prior to the resolution of the certification applications and they should be dismissed on the basis of delay. After hearing from the union's representative, we struck those allegations from the Complaint on that basis.

III Scope of the Board's Jurisdiction

A. Where Specific Section of the Act Not Pleaded

11. Section 66 of the Act reads as follows:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

12. At the hearing, counsel for Saco directed his legal submissions only to the elements of "refuse to employ or continue to employ" on the basis that the Complaint did not set out "discrimination" as a separate violation. Subsequently, by decision dated June 7, 1988, we requested the parties to make written submissions on the application of the term "discrimination" to the evidence adduced and/or the issues raised in this matter. (We emphasize that our request should not be taken to mean that we believe we were *required* to seek submissions when counsel has chosen of his or her own volition not to pursue a matter; however, in this case, we believed that it would be of assistance to have such submissions before us in reaching our conclusions on the evidence which had been led by both parties.) The major thrust of the submissions filed by counsel for Saco is that we cannot now "amend" or permit an "amendment" of the complaint to allege that there was discrimination, as well as a refusal to employ or continue to employ. Such a submission confuses the pleading of a legal theory of the case with specific allegations or statements of material facts which a party believes supports the legal theory. With respect to particulars or the setting out of material facts, the Board is strict, requiring a party to set out all the particulars necessary for the opposing parties to meet the case against them. But it is more lenient with respect to the pleadings themselves and does not require that a party plead a specific section or specific portion of a section. It is prepared to find that a section or portion of a section that has not been pleaded by a party has been contravened if the evidence supports such a finding.

13. In *New Ontario Dynamics Limited*, [1975] OLRB Rep. Nov. 845, a certification case in which the applicant alleged a contravention of the Act without specifying which sections of the Act had been contravened, the Board held that it is not necessary to state the specific sections and that the crucial issue is whether there are sufficient particulars of the allegations provided the respon-

dent. It concluded: “As for the applicant’s failure to ‘plead’ a specific section of the Act, we took the position that the Board is obligated to apply any section of the legislation that the evidence reveals has been contravened” and cited *Genaire Ltd. v. International Association of Machinists and Ontario Labour Relations Board* (1958), 14 D.L.R. (2d) 201 (Ont. H.C.) in support. In that case, McRuer C.J.H.C. said the following:

It is argued by Mr. Dubin, counsel for the Board, that the applicant is strictly confined to seeking within the provisions of [then] sections 41-44 of the *Labour Relations Act* a right to make the application in its present form. With this argument I cannot agree. *I do not think the procedure before the Labour Relations Board should be so formal that if an applicant makes an application for relief that he ought not to be granted the relief to which he is entitled because of some technical formality in the framing of the application.* In this case I think in substance the application can be considered an application to the Board to revoke its formal order and, that being true, *the Board should exercise any jurisdiction given to it under the Act notwithstanding that a particular section of the Act is referred to in the formal application.*

[emphasis added]

That conclusion and the reasons for it were explicitly approved by the Ontario Court of Appeal at (1958), 18 D.L.R. (2d) 588.

14. Section 66(a) of the Act refers both to “refuse to employ or continue to employ”, and to “discriminate against a person in regard to employment”. Not only does the Board have the jurisdiction to find a violation under a portion of the Act not pleaded by the complainant when the evidence supports such a finding, it has an obligation to do so in the manner directed by McRuer C.J.H.C., as approved by the Court of Appeal. Again, it must be emphasized, in light of counsel’s submissions, that any finding of discrimination can be based only on the evidence adduced at the hearing with respect to the material facts as alleged by the union in its Complaint. Clearly, to base a finding of a contravention of the Act on anything else would be contrary to the requirements of natural justice; but where the respondent has had every opportunity to respond to the allegations in the Complaint by bringing whatever evidence it considered appropriate (subject to rulings by the Board), it does not deny the respondent natural justice to find that the same evidence supports a legal conclusion not specifically pleaded, as long as the respondent was not *denied* an opportunity to argue the case on that basis. Accordingly, we have considered whether the evidence supports a finding that Saco discriminated against the grievors separate and apart from whether it contravened the Act by refusing to employ or to continue to employ them. That does not, of course, extend our inquiry beyond the very subsection cited by the union in its Complaint.

B. Where there is no Employment Relationship between the Grievors and the Respondent or no Request for Employment by the Grievors

15. Having refused to treat as a preliminary matter the submissions of counsel for Saco that we have no jurisdiction to deal with this complaint because there was not an employment relationship between the grievors and Saco in the spring of 1987 and that there cannot be a refusal by Saco to hire the grievors without there first being a request by the grievors for a job, we deal with them now. Counsel relies on *New Holiday Tavern*, [1987] OLRB Rep. May 753, which concerned an allegation under section 66 of the Act that the respondent refused to employ members of the union in a sale of a business context; the Board stated at para. 19 that “[i]t cannot be said that a respondent has ‘refused to employ or to continue to employ’ a grievor unless the grievor had applied for employment by, or was an employee of, the respondent at the time the alleged unfair labour practice is committed”. We do not find *New Holiday Tavern*, *supra*, of assistance for two reasons: the nature of the relationship between Saco and the crew members, which we consider immediately

following; and the prohibition under section 66 of certain forms of conduct which may constitute "discrimination ... in regard to employment" against persons who are not, from a legal point of view, employees of the respondent.

16. Fishing is a seasonal industry: usually the boats go out sometime in March or April and finish anywhere from the end of October to the middle of December, usually determined by when the quota has been caught. Exceptionally, a boat may continue to work, on a leased licence or for fish not requiring a quota. The employees receive a "Record of Employment" and collect unemployment insurance or go to Portugal during the winter. Although there is no legal obligation on an owner to employ a specific individual the next year, it appears that generally in the industry, and certainly at Saco, fishermen from the previous year will return to the same employer, quite often on the same boat. This pattern, to which there are, of course, exceptions, is not seriously disputed by either the union or the company in this case. Witnesses called by Saco and by the union understand that deckhands are hired for the season and that the employer can hire whomever it wishes. But those same witnesses also showed, through their own experience, as fishermen, captains or owners (and in some instances, one witness may have been all three, as in the case of Ed Penner, a Saco witness), that, especially in recent years, a crew would likely stay together from one season to the next, although individual crew members might quit the company or transfer from one boat to another at their own request or in response to the needs of the company.

17. For example, the crew of the "A. Poupada" at the end of 1986, was composed of Francisco Petinga (the captain), Antonio Inacio, Antonio Poupada, Armindo Ferreira, Fernando Santos, Victor Peixe, Porfirio Peixe and Renaldo Bras (Mr. Bras had joined the crew during the season). Five members of that crew, and the captain, had been on the boat in 1985 and as many as four of them had been on the "A. Poupada" with Captain Petinga in 1984, as well, according to Captain Petinga. Messrs. Petinga, Bras and Santos and Victor and Porfirio Peixe all returned in 1987; the only ones who did not return were the grievors Ferreira, Inacio and Poupada. Carlos Agueda and Joao Murracus, both of whom had been on the "Miss Nicole" in 1986, the boat which was not fishing in 1987, were added to the "A. Poupada's" crew in 1987. The captain of the "Miss Nicole" returned to Portugal at the end of 1986 and the remaining four crew members were the grievors Pilo, Guerra, Bulhoes and Verrissimo. The crew of the "Isabel Maria" remained the same in 1987 as it had been in 1986, with Jorge Barbosa as captain. There had been no grievors in the 1986 crew on the "Isabel Maria".

18. Looked at from a different perspective, each of the grievors, with one exception, had been on the same boat for at least three years by the end of the 1986 season. Antonio Inacio had fished on the "A. Poupada" since 1983, as had Antonio Poupada since he had transferred there from the "Isabel Maria" during 1983. Armindo Ferreira had fished on the "A. Poupada" from 1984 until the end of the 1986 season; at the end of 1984, after he asked Mr. Codinha if he could go to another company for a short period to earn extra money, Mr. Codinha put him on the "Miss Nicole" after the "A. Poupada" had completed its quota, but Mr. Ferreira returned to the "A. Poupada" in 1985. Joao Bulhoes had been on the "Miss Nicole" since at least 1983, exclusive of a short period at the beginning of the 1984 season when he was not working for Saco, having quit, along with his captain, Antonio Santos, in order to work on a boat to be purchased by another fishery; when the expected purchase did not materialize, he asked Mr. Codinha if he could come back to work for Saco and in fact returned to the "Miss Nicole". Paulo Guerra had worked on the "Miss Nicole" since 1984, having previously fished on the "Jorge B." which sank (after the sinking, he went to Portugal and upon his return the next spring his father asked Mr. Codinha if his son could fill a vacancy on the "Isabel Maria"; Mr. Codinha explained that that job was for Joao da Silva Jr., but that Paulo Guerra could have a job on the "Miss Nicole", if it went out, and he was

called by Jorge Barbosa, the captain of the "Miss Nicole", to set nets in March 1984). Julio Verrisimo had worked on the "Miss Nicole" since he started with Saco in 1984.

19. The most peripatetic grievor is Cipriano Pilo, but his history is instructive in indicating the circumstances under which crew members stay with Saco. He began working for Saco on the "Isabel Maria" in 1981; fired from that boat in the fall of 1982, after a short period of unemployment he obtained a position on the "A.B. Hoover" to replace his brother who had left in order to attend to his terminally ill wife. Cipriano Pilo did not return to the "A.B. Hoover" in 1983, however, because Captain Santos did not want him back; consequently Cipriano's brother returned to the boat. In 1983, he joined the "Jorge B.", but quit when the captain, Joao Bulhoes, was replaced by a man with whom Mr. Pilo was not on speaking terms. When a vacancy opened up on the "Avco" later in 1983, he was hired to fill it, returning to the "Avco" in 1984 and 1985; during 1985, the whole crew, including Mr. Pilo, were transferred to the "Isabel Maria" and then, on his request (again because of disagreements with the captain), he was transferred to the "Miss Nicole" where he finished the 1985 season, returning in 1986.

20. Recognizing that there are deviations from it, the general pattern which has developed, therefore, is that the crew return to the boats on which they finished the previous season. The contentious issue is how that occurs: what is the nature of the relationship between events at the end of the season and the return of the crews in the spring? The company contends that there is a universal and invariable "practice" in the industry that at the end of each season each member of the crew approaches the captain of the boat on which he fished and asks if he can "count on" work for the next year, or words to that effect: this practice is referred to by the company as "confirming". The union, the other hand, argues that there is no such practice, that crew members do not specifically and explicitly ask for their jobs, but expect to be fishing the next season unless told otherwise; when the next season starts, the union says, the captain calls the men to tell them when they will be going to set nets. The company says the captain calls only those persons who confirmed their jobs for the coming season.

21. We have considered all the evidence, much of it contradictory, on this matter and conclude that neither position accurately reflects what happens every year. Rather, there is an informal "practice" by which crew members find out about the next year, which differs from person to person. One crew member might ask the captain what will happen next year, the captain might comment "see you next year" or "we'll be fishing for perch next year" or a crew member and captain might mention it when they meet on the street during the winter hiatus. Some (even many) crew members likely do ask whether there will be work for them the next year, perhaps because they need explicit reassurance or from habit developed when they came to Canada under annual "labour contracts". But we cannot give credence to the claim that even sons or sons-in-law would be out of work simply for failing to ask one question: "Can I count on my job next year", in what is essentially an unstructured industry from a labour relations point of view. That is not to say that both owner and deckhands do not want to know what is going to happen the next year so that they can plan and conduct themselves accordingly. Nor does it mean an owner cannot refuse an individual work the next year: nothing obligates an employer to rehire the same crew, even if he has said he would, if conditions change, or to hire a crew man who did not seek employment until after the owner had hired all the men he needed - as long as such a decision remains untainted by anti-union considerations. In sum, we do not believe there is the rigid system which Saco claims there is. Even Laverne Kelly, one of Saco's witnesses, who was a deckhand for five years and a captain for twenty-seven years, seventeen of which he was an owner-operator of a boat, who testified that even a man who had worked for him for sixteen years had to ask him every year for a job, also said that "if I wanted to get rid of a person, I'd tell him when he asked for a job; [but] if he didn't ask, I wouldn't call him back in the spring", not because he had not asked but because Captain Kelly did

not want him back, and that he had *offered* a man work for the following year. Similarly, one of the union's witnesses, John Batista, the owner of a fishery which was the subject of a Complaint by the union, who testified that the practice of confirmation existed, did call one of the men who had worked in 1986 for work in 1987 after the latter had made the "mistake", for the first time, of not confirming. Thus the failure to ask for a job, even with respect to those who claim there is an invariable practice of confirmation, is not necessarily determinative of whether the deckhand would return the following year.

22. We conclude that in one way or another crew member, captain and owner know, prior to the beginning of the next season, who will compose the crews in the spring. One reason for that knowledge is that in a practical, albeit not legal, sense, there is a presumption of employment from year to year. As we have indicated, the same crew could be with a boat or an employer for several years. We are satisfied that only when it was clearly indicated, would a crew member not reasonably expect to be coming back the following year. Accordingly, a failure to rehire in the context of this case (and both union and employer attempted to show that the practice they were championing was one used throughout the industry), cannot be said to be conditioned on a formal request for employment: in our view, that would not properly reflect the reality of what actually occurs. For that reason, a denial of the reasonable expectation of the crew members with respect to employment in a subsequent year because they support the union, alone or in combination with other factors, may constitute discrimination in regard to employment, even if there has not been a continued employment relationship or an explicit request for employment.

IV The Application of Subsection 89(5) of the Act

23. The company bears the onus under subsection 89(5) of the Act of satisfying us that the choice of individuals for the 1987 crews was not affected by the grievors' union support or by anti-union considerations. The Board explained its concern about anti-union motive and the nature of the employer's onus in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at para. 4:

4. ... Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti-union motive and which the evidence establishes to be the only reason for its conduct.

The specific task of the Board in cases of this kind was articulated in *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745, at para. 9:

9. The location of the onus of proof is an important consideration in cases such as this one. The reasons, or reason, behind the discharge of an employee occurring in the context of union activity are best determined by an examination of the objective circumstances surrounding the discharge. In other words, the circumstantial evidence surrounding the discharge must be examined and inferences drawn from that evidence. There are two competing inferences that can be drawn -- either that the discharge was motivated by an anti-union animus or that the discharge was for some reason totally unrelated to the presence of union activity at or around the time of discharge. The Board must determine which of the two inferences is the more probable.

In this case, the issue is not a "discharge" but rather a deviation from a usual pattern of seasonal hiring, resulting in a failure to rehire persons who would normally have a reasonable expectation of being rehired; that still requires an analysis of the events surrounding or comprising the deviation with resulting inferences and a determination of which of the two inferences referred to by the Board in *The Barrie Examiner*, *supra*, is more probable. (Also see, more recently, *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449.) It is important to observe that our responsibility is not to decide whether it was more or less appropriate to reduce the crews by not recalling the seven griev-

ors than other men who had previously fished for Saco (or indeed, than hiring persons new to the company in 1987); it is sufficient in this case to assume that Saco could compose the crews as it wished -- limited only by the requirement that it abide by the *Labour Relations Act: Honest Ed's Limited*, [1985] OLRB Rep. Nov. 1609. A change in a pattern of hiring, given the nature of this industry, which has a negative effect on union supporters, and not on other persons, will lead to an inference that the change -- under other circumstances quite legitimate -- has been motivated by anti-union considerations, but is is an inference that can be rebutted by the employer's satisfying the Board that the reason for the change was totally devoid of anti-union considerations, that is, solely for reasons in relation to which this Board has no jurisdiction.

V The Merits of the Complaint

24. Mr. Codinha said that he did not know that the grievors were union members, except Armindo Ferreira who stood up at a meeting called by Mr. Codinha and attended by all his employees in April 1986, shortly after the union started organizing the boat crews ("the shanty meeting"), and announced that he had joined the union. We find that the evidence supports an inference that Mr. Codinha believed that the grievors did support the union and, indeed, that the crew members Saco did hire in 1987, did not. Joao Bulhoes was involved in a march on Mr. Codinha's home, from which Mr. Codinha said he could "assume", although he did not know, that Mr. Bulhoes was a member. He specifically stated that he had "an idea" that Antonio Inacio was member. But he also said that over time the others stopped talking to him and insulted him and that he had "an idea" that they were members of the union. In cross-examination, Mr. Codinha said that he "learned over time" that the seven grievors were members of the union and that he thinks and presumes that the sixteen persons hired for the 1987 season are not members of the union. Taking into account these comments of Mr. Codinha, the tight-knit nature of the Portuguese fishing community and the dominating impact of the union organizational drive, we conclude that Mr. Codinha would be able to learn -- intentionally or otherwise -- and did believe that the seven grievors were union members or supporters.

25. Mr. Codinha explained that he decided it would be more efficient to run only two boats and he decided to sell the "Miss Nicole". We are content to assume that that decision was made for legitimate business reasons; even if that is the case, and the crew complement had to be reduced, there remains the question of why the *grievors* were the ones without employment in the spring of 1987. The sequence of events from April 1986 to the spring of 1987 lead us to infer that the grievors' support for the union, about which Mr. Codinha was aware, was a factor in their not being employed by Saco in 1987.

26. Towards the end of April 1986, Mr. Codinha called the shanty meeting. Jorge Barbosa told us that he had advised his father-in-law that he had heard his crew talking about threats of fines by union supporters against persons who did not support the union, as well as statements that the owners would lose their boats, and that Mr. Codinha should tell the men that such things could not happen. Mr. Codinha testified that his nephew Joao (or John) da Silva Jr. came to him and told him about being threatened with a fine or suspension for not joining the union and about threats that Saco would be eliminated from the fishing industry (these threats were apparently made by Domingos Belo) and that was why he called the meeting. Mr. da Silva Jr. denied he had told his uncle about the threats but his wife, Alda da Silva, said that her husband had mentioned them at a family dinner at Mr. Codinha's home. We are satisfied that Mr. Codinha called the meeting to inform his employees that the union could not threaten them and that they could choose to join the union or not. From the evidence of the witnesses who testified about the meeting, who remembered selected aspects, but rarely all, of it, we can "piece together" what Mr. Codinha said to the employees.

27. It was commonly stated by union and Saco witnesses that Mr. Codinha asked each person in attendance questions about the way in which the company was treating him or her and whether he or she was being paid properly (the crew are paid a percentage of the catch), as well as about safety on the boat. Generally, he asked whether his employees had any complaints: none of those present indicated they had (with the exception of one or two raised by one crew member against another). Witnesses from both the union and the company also said that he told them that no one had a right to intimidate them, including himself, and that they had the right in a free country to join or not join the union. He made some reference to the fishermen's union in British Columbia which seemed to be to the effect that there were successful and non-successful union and non-union boats. He also spoke about the possibility of having to lay off some men if faced with economic problems; he referred to men with the least years of service, including Mr. Ferreira, but not to other grievors (we find that these comments followed Mr. Ferreira's announcement that he had joined the union). On the other hand, he also discussed buying another boat and offering the captaincy to Joao Bulhoes. We do not consider whether this meeting in itself constitutes an unfair labour practice (it was one of the particulars alleged in relation to section 70 of the Act which we struck out), but refer to it to indicate that the presence of the union created in Mr. Codinha's mind sufficient concern that he felt he needed to address his employees on the matter, even if only to try to ensure peace and good will among his crews. The meeting was interrupted by a pro-union demonstration held outside the shanty during which demonstrators shouted insults apparently directed as Mr. Codinha and/or at some of his employees and later that day there was a demonstration at Mr. Codinha's home which made his family concerned and fearful.

28. Although following the meeting and over the summer period there were certain events alluded to by various witnesses which indicated that the union's campaign was a relevant presence, the next major event of concern to us occurred at the end of the season when the crew members were handed a Record of Employment which gave "end of contract" as the reason for its issue. Previously, the reason given had been "shortage of work". The purpose of this change, according to Mr. Codinha, was to reflect the reality that fishing is a seasonal occupation and that the fishermen are hired for a season at a time and are unemployed from the end of one season to the beginning of the next. They are not laid off because of a shortage of work in the sense that the boats could not catch more fish or the lake was frozen, but because the quota has been exhausted. The change in wording came about as a result of the advice of Mr. Codinha's lawyer, Gary McLister. The Records of Employment were issued in November and December 1986, shortly after each of the boats finished fishing for the season. Ironically, the phrase "shortage of work" which was not applicable before 1984, when fishing generally stopped only because of the weather, appears to be applicable with the introduction of quotas, since when the quotas are exhausted, there is no more work (this conclusion is supported in fact by the wording on the application forms referred to below which were composed by the employer or Mr. McLister or with Mr. McLister's approval).

29. Mr. Codinha is entitled to change the conditions of work or to introduce new aspects to the operation of his business. He is entitled to change the words on the Record of Employment. In this case, though, that change, in our view, was largely a response to the union's attempts to organize the industry, including Saco, and was intended to make clear that Saco did not consider its fishermen to be continuously employed with it. It set the stage for Saco's position that the grievors could not reasonably have had an expectation of employment from year to year and that they had to ask specifically for work each year. Some of the grievors were worried that the change in working would mean that they would not be able to collect unemployment insurance over the winter and took the Record of Employment to Michael Darnell, the union's representative, to find out if that were so; one of the grievors, Antonio Poupada, also commented that when he saw the wording, he thought he might not have a job next year because he had joined the union. Otherwise, nei-

ther the grievors nor the men who did obtain employment in 1987 questioned the change in wording.

30. Mr. Codinha and many of the men who had worked on Saco's boats spent the winter of 1986-1987 in Portugal. This was not at all unusual, as many of the fishermen visit their native towns and villages every year; some of them have homes there and a few even their families. Nazare is a small place and those people visiting from Canada see each other on the street or at some event, such as a soccer game. This is what happened with Mr. Codinha and half the men who became his crew for 1987; according to Mr. Codinha, and the fishermen, they met, in all but one case, by chance, and each man asked him about a job for the coming season. The application forms which he later had them fill out in Canada show that he met most of them within a period of a few days. Since he was now in a position to tell them he could hire them, he in fact did so. (The other half of the current crew were hired in Canada in late December for early fishing in January.)

31. The grievors Cipriano Pilo and Antonio Inacio both went to Portugal during the winter of 1986-87, the former for about three weeks, returning in January 1987, the latter from December 1986 until March 11, 1987. Although both saw Mr. Codinha there, neither talked with him. Mr. Inacio had spoken with Mr. Codinha in November, prior to leaving for Portugal, to find out what was happening next year. Mr. Codinha told him he could not tell him, as he could not tell anyone. He said he could tell Mr. Inacio after he (Mr. Codinha) returned from Portugal. Julio Verrissimo also spent the winter there, but there is no evidence that he spoke with Mr. Codinha. Joao Bulhoes definitely did not go to Portugal and it does not appear that the other three grievors did, either.

32. As indicated, we were told that the remainder of the current crew applied in Canada at the end of December 1986, only two weeks or so after some of them had been told, according to their testimony, that no jobs could be confirmed. Those persons who were hired at the end of December 1986, went fishing in January 1987 because the lake was unusually clear of ice; in fact, nets were set at the end of December and lifted in January. There was no further fishing until March 1987. The jobs of these men were confirmed at the end of December for the spring of 1987. In examination-in-chief, Captain Barbosa initially said that when he telephoned Mr. Codinha to see about going out and hiring the men who had called him, he had *not* told his father-in-law the names of the men; later in chief, however, he said he had told him the names and he said the same thing in redirect examination. We find that Mr. Codinha was aware of the identity of the persons who were to fish after Christmas.

33. Upon his return to Canada in March 1987, Mr. Codinha called a meeting for March 12th at his daughter and son-in-law's home of the men whom he or Jorge Barbosa had told could work for the 1987 season. At the meeting, Mr. Codinha explained that the persons present would be his crew for the coming year and to which boat they would be assigned. Each fisherman present filled out a form entitled "Application for Employment Season" (the year "1987" was handwritten in the blank space). (At least one man, Joaquim Vagos, was still in Portugal, but he filled out the form on his return, at Jorge and Isabel Barbosa's house.) The form asked for the applicant's name, birth date, social insurance number, telephone number, address, the position applied for, whether the applicant had had experience in that position and the number of years' experience. The form contained the following paragraph:

I acknowledge that if I am hired by Saco Fisheries Limited, it will be for the ["1987" handwritten in] fishing season only, and this contract of employment shall be automatically terminated when fishing is stopped due to inclement weather or shortage of work due to completion of quotas and that thereafter there should be no obligation on the part of the employer to re-hire me at any latter date for any purpose.

It also indicated the date the person made the application, the person's signature, the signature of the person who hired the applicant and the date hired. At the bottom of the application, in handwriting, was the date and place the applicant had asked for a job, based on notes Mr. Codinha said he had made in Portugal. The forms appear to have been completed by the same person, except for the applicant's signature and the signature of Mr. Codinha and the date the person was hired; the latter appears to be in Mr. Codinha's hand. This was the first time Saco had a requirement that its employees complete an application form. As with the records of employment, we were told that the application forms were implemented as a result of legal advice in order to have in writing what was always done orally. Mr. Codinha testified that he thought something might happen because counsel for the union had written a letter to Saco expressing concern about the implications of the change in wording on the Record of Employment.

34. According to the application he signed, Francisco Petinga applied for a job as boat captain on February 26, 1987 and was hired on that date by Mr. Codinha; he "[a]sked for job on Feb. 26/87 in Sitio (home)", according to the handwritten notation on his application. We had evidence that Mr. Codinha, who had been attending a church located close to Mr. Petinga's home, took the opportunity to visit him and it was at that time that Mr. Petinga asked for the job. Carlos Agueda applied for a job as "deckhand". The date he applied is indicated as "Feb. 27, 1987"; he was hired by Mr. Codinha on February 27, 1987 and at the bottom of the page is the notation "Asked for job on Feb. 27/87 in Nazare". Reinaldo Bras applied as a "deckhand" on February 22, 1987 and was hired by Mr. Codinha on that date; he "[a]sked for job on Feb. 22/87 in Peniche (Bar)" (Peniche is a town close to Nazare in Portugal.) Exactly the same is the case with Porfirio Chicharro and Francisco Inacio. Luis Mauricio also asked for a position and was hired as a deckhand on February 22, 1987, but "in Nazare (soccer field)", as did Rogerio Mauricio. Joaquim Vagos made his application on February 23, 1987, "in Nazare (Capitania)" and was hired by Mr. Codinha that day. Mr. Codinha's son-in-law applied for a job as "boat captain" on December 28, 1986 and was hired by Mr. Codinha on that date; there is no handwritten notation on his application. Joao P. da Parteira, John da Silva Jr., Joao da Silva Sr., Joao Murracas, Porfirio Peixe, Victor Peixe and Fernanda Santos applied as deckhands on December 29, 1986, and were hired by Mr. Codinha on that date; there is no handwritten notation on their applications. In all cases, the men had been told they had jobs and in some cases had actually fished before ever seeing, never mind signing, the forms. Again, while in the normal course Saco was entitled to implement application forms, in the circumstances of this case, such an application is at best a formality: the decisions to hire had been made as far as two and a half months before for some of the employees and all the forms do is emphasize the artificiality of the process engaged in by Saco in hiring for the 1987 season and provide documentary, self-interested evidence, of the grievors' not having participated in the new arrangement.

35. Subsequently, three of the grievors called either Captain Petinga or Mr. Codinha to find out when the boats were starting or generally about work. Armindo Ferreira met Captain Petinga at the Wheatley harbour after the latter returned from Portugal in March, and asked him when they were going to work (Captain Petinga said Mr. Ferreira asked him whether he had authorization to set nets); the captain could give him no information. After trying unsuccessfully to contact Mr. Codinha, Mr. Ferreira talked to other of the grievors and they decided to take their problem to the union. Mr. Inacio also talked to Captain Petinga who told him first that he had no orders to set nets and then, a few days later, that he could hire only those men the owner told him to take on the boat. When Mr. Verrissimo called Mr. Codinha in March, he was told, in response to his request, that yes, it would be better if he looked for other work (it appears by then Mr. Codinha was acting under legal advice not to talk to the grievors).

36. We are struck by two apparent "coincidences" of timing. The first is that all the men fishing on the Isabel Maria from December 30, 1986, asked Captain Barbosa on the same day if the

boat was going out, at least according to their application forms, filled out March 12, 1987. The second coincidence is that all the men who were hired in Portugal were hired within a short period in February 1987, two weeks or so before people started returning to Canada. Mr. Codinha knew who his crews would be before coming back from Portugal, but nevertheless gave Captain Petinga no information about that before leaving Portugal, despite having made the social visit to him earlier in the month at which time he had already "confirmed" the jobs of the men who fished in January and already had known for over a month of the resolution of all the problems he claimed had prevented the usual confirmations, to the same extent as he knew in February when he confirmed the rest of the 1987 crews. Quite simply, we do not believe that these two groups of hirings were coincidences, but, rather, were orchestrated to ensure that the crew complement would be satisfied without need of the grievors.

37. The events of the spring of 1987, especially seen in the context of events from April 1986 on, and in light of the fact that the union's second application for certification was not resolved until September 1986 (reflected in the October decision) were a dramatic departure from the usual situation. We find no explanation for that departure which satisfactorily rebuts the inference, drawn from the "coincidence" that the seven men not working on the boats in 1987 were union supporters, while those who were working on them in 1987 were believed not to be union supporters by Mr. Codinha, that the grievors' support for the union was a factor in their not being employed by Saco in 1987. The changes in procedure, the refusal to deal with employment at the end of the season, the fact that only Mr. Codinha and his son-in-law hired men for 1987, instead of the usual practice, through the captains (with Mr. Codinha having the final decision-making power, generally delegated to the captains), including Captain Petinga, the hiring in Portugal and after Christmas in two groups, all effectively eliminated the grievors from contention for employment with Saco in 1987. This was true even of the three grievors who had approached either Captain Petinga or Mr. Codinha in March 1987 to ask about the 1987 season. (In addition, one of those three, Mr. Inacio, had spoken to Mr. Codinha in November 1986 about the next season.) The change in Mr. Codinha's treatment of the grievors cannot be ignored. For example, he had rehired Joao Bulhoses even though he was not pleased that he had quit in 1984 without telling him. Even when he had difficulty with Cipriano Pilo, he had transferred him to another boat rather than dismiss him. He had offered Mr. Ferreira a place on one of his boats after he met Mr. Ferreira in Toronto where the latter had gone to to work and Mr. Ferreira told him that he was not really happy there; when Mr. Ferreira asked him if he could fish on the "Isabel Maria", Mr. Codinha explained that that boat would then have too many crew members, but he could put Mr. Ferreira on the "A. Poupada". Again, Mr. Codinha gave him a place on his boat even though he was annoyed that Mr. Guerra had failed to remain in Canada to attend at the inquest into the sinking of the "Jorge B.". After giving nearly all of the grievors assistance of one kind or another and after having given them the benefit of the doubt on different occasions, he suddenly refused to give them any information about hiring for 1987 and was apparently totally oblivious to the fact that they were unemployed, in large part as a result of his own actions.

38. The grievors' job performance was not an issue in this case and was not put forward as a reason for their not being hired again in 1987. There was no claim by Saco that any of the grievors were not competent employees; on the contrary, Mr. Codinha testified they were good employees. Although Mr. Codinha testified he had been insulted by some of the grievors and was upset for his family, that was not given as a reason. Nor does Saco argue that these seven men were the employees with the least service with the company; "seniority", used in a formal sense, does not apply and there were employees called in 1987 who had fewer years experience with Saco than any of the grievors and some who had more years experience than some of the grievors. The only reason provided by Saco is that the grievors did not confirm their employment or ask for jobs at the end of

the 1986 season or between the end of the 1986 season and the beginning of the 1987 season and that Saco had sufficient crew without them.

39. That explanation does not satisfy the onus on Saco to rebut the inference drawn from all the events considered above. We have found that the practice at Saco did not require the fishermen to ask for their jobs for the next year in an explicit and formal way, but that in the normal course both employee and employer would expect a continuation or resumption of the previous year's relationship. Mr. Codinha decided to institute new practices; that would not have created a problem if those practices and other conduct had not negatively affected only those employees who supported the union and were believed by Mr. Codinha to support the union. We note that even if we were to accept the employer's version of the "practice", on the evidence of Saco's witnesses there was a change, at the employer's behest, in the way the end of season "confirmations" were handled. These witnesses testified that every year, at the end of the season, each crew member asks about a job next year and is almost unfailingly assured that there will be a job, but that at the end of 1986, they were told by the captains that they, the captains, could not confirm jobs because of some business decisions that the owner had to make. The men were not told what they were; however, Mr. Codinha testified that he was trying to sell a boat, the W.H. Wheeler; there was some question about whether the quota would be cut; Saco was attempting to buy another fishery; and he was also engaged in writing to the Ministry of Natural Resources about what he believed to be unfair treatment of him with respect to the quotas: except for the latter, all these matters were resolved in December, 1986. Minutes of a captains' meeting held on October 17, 1986, indicate the captains were told that they could not confirm jobs because of impending business and to advise the crew to contact them later, "around the end of the year", but it does not appear that the crew were all told that. Whichever the practice, we conclude that matters were left open and ambiguous and their resolution resulted in discrimination against the grievors.

40. We do not doubt that Mr. Codinha felt that the union and its supporters had insulted him and frightened his family. It is also clear that he had had a good relationship with his employees -- the grievors themselves say that he did -- and perhaps could not understand why some of them would want to join the union and, furthermore, would be willing to put a breach between him and themselves because of that. And it may be that he thought that his business would run more effectively or smoothly if he did not have to deal with disputes between the union's supporters and its opponents. There may, in other words, have been all kinds of reasons why Mr. Codinha did not want the seven grievors in his employ in 1987. But that does not warrant not calling them for the 1987 season or for discriminating against them because they supported the union. In this case, the discrimination takes the form of effectively closing out the grievors from the possibility of employment in 1987 through the cumulative effect of the ambiguity at the end of the 1986 season, which ambiguity was a direct result of the employer's own actions, the hiring of employees in Portugal and the other factors discussed above.

VI Declaration and Remedy

41. We therefore declare that Saco has contravened section 66(a) of the Act.

42. The union seeks reinstatement and compensation for the period of lost employment, that is the difference between monies the grievors would have earned in 1987 and 1988 and their earnings from other employment, as well as a meeting between the union and the other employees without any interference by Mr. Codinha.

43. The employer does not object to a meeting. We therefore direct that Mr. Codinha allow the union to meet with his employees (that is, the men currently fishing on his boats). The grievors may attend the meeting. The union and Saco shall determine the appropriate place and time.

Should they not be able to make mutually satisfactory arrangements, we remain seized of the matter.

44. Counsel for Saco urged us to adopt the approach taken in *Peralta Foods*, [1987] OLRB Rep. Sept. 1162, with respect to the issues of reinstatement and compensation. In that case, the Board found that the corporate and/or individual respondents, also engaged in the fishing industry on Lake Erie, had breached sections 79(2), 66 and 70 of the Act. The applicant had requested that the grievors in that case be reinstated with compensation for their losses or for full compensation for the 1986 and 1987 seasons (the Board found that the grievors had been improperly laid off prior to the end of the 1986 season). The Board declined to grant reinstatement, but ordered compensation, because the boat on which the grievors had fished was no longer in operation and had been unprofitable; furthermore, the corporate respondent did not own any fishing licences and may not have been able to “rent” any at that time. There might also have been practical difficulties of enforcement with respect to a reinstatement order. But the Board also said that “[a] compensation order, on the other hand, is clearly warranted”; it limited compensation to the losses incurred by the grievors in the 1986 season since “it is far from certain that [their boat] would have fished during the 1987 fishing season even if the grievors had not joined the Union. Moreover, it is clear from the evidence adduced before us that captains and crew members often leave one boat at the end of a fishing season and go to work on another boat during the next fishing season. Thus it is questionable whether the grievors would have worked for the Company during 1987 in any event”.

45. In this case, one of the boats, the “Miss Nicole”, which operated in 1986, is no longer operating. Although Saco is not in the same position as the employer in *Peralta Foods*, *supra*, which the Board found not to be profitable, and indeed, appears to be one of the most successful employers on the Lake, we do not believe we should require Saco to put another boat to work. Therefore, to reinstate the grievors would require that seven of the current crew be laid off in the course of the fishing season. For reasons which include the practical concerns referred to in *Peralta Foods*, *supra*, we are not prepared to require Saco to do that. We emphasize, however, that where the Board is satisfied it would be appropriate, reinstatement is an available remedy in the fishing industry, as elsewhere. Compensation is an appropriate remedy in this case, however; our determination is based on our finding that all the grievors were denied an opportunity to be considered as crew members because of the actions taken by the respondent, even though it is quite possible not all of them would have been rehired in 1987 or again this year. On the other hand, it is likely that some of the grievors would have worked on the remaining boats during 1987 and 1988, and perhaps in 1989, given the pattern of employment we have found. We have considered whether to direct Saco to give the grievors an opportunity to serve as crews in the coming fishing season. We have decided not to do so, however, primarily because the union failed to direct itself to the basis upon which we could make such an order which would require an assessment of the likelihood of each of the grievors being selected as crew in 1989. We are not in a position *in this case* to make that assessment adequately and therefore decline to do so. For those reasons, the compensation we have awarded is in our view the most appropriate remedy.

46. We hereby direct Saco to pay the grievors compensation for the 1987 season beginning in March 1987 and for the portion of the 1988 season until the date of this decision. The amount of compensation is to be based on the assumption that the grievors would have been members of the crew on the “A. Poupada” or the “Isabel Maria” and on an average of the amounts earned by the crews on those boats for the 1987 season and relevant portion of the 1988 season, taking into account the application of the principle of mitigation.

47. We remain seized in the event a dispute arises in relation to implementing this remedial order.

DECISION OF BOARD MEMBER R. M. SLOAN; October 25, 1988

1. I must respectfully dissent from the majority decision.
2. The evidence shows that prior to the organizing drive by the Great Lakes Fishermen and Allied Workers' Union (the Union) the relationships between Saco Fisheries Limited (Saco) and the crew members of its various vessels were exemplary. According to uncontradicted testimony the owner and President of Saco, Mr. Adriano Codinha practiced a management style that promoted a "family" relationship between himself and his employees, and among the employees themselves.
3. In 1986, the Union appeared on the scene in Leamington and Wheatley and evidence adduced shows that Mr. Adriano Codinha, members of his family, and a number of his employees who were not union members, were subjected to acts of insult, intimidation, and terror.
4. The conduct referred to in paragraph 3 includes: A noisy and threatening demonstration at Saco's shanty in Wheatley; two similar demonstrations at Mr. Codinha's home; personal insults directed at Mr. Codinha by a number of grievors; threatening telephone calls to Mr. Codinha and Mrs. Isobel Barbosa, who is Mr. Codinha's daughter; and an assault upon Mr. Joao DaSilva Sr., who is Mr. Codinha's brother-in-law, for which three union supporters were charged and convicted.
5. Why Mr. Codinha was singled out for such hostile attention by the Union is open to conjecture. The most cogent explanation would appear to be that the Union was not having success in signing up Saco's employees (the Union did in fact withdraw two certification applications due to lack of membership support) and chose to make an example of this high-profile employer and his employees to attempt to influence by intimidation or other coercive means the decision of other reluctant potential union members in the industry and community who chose to exercise their rights to oppose unionization.
6. I have dealt with the matter of the Union's behaviour in some detail as I wish to contrast it with the behaviour of Mr. Codinha in dealing with the question of the potential unionization of his employees. Despite the extreme provocation, which could well have justified different behaviour, we find that there is not a scintilla of evidence that any anti-union discussions, behaviour or actions took place, in fact:
 - a) the seven (7) grievors gave testimony to the fact that neither Mr. Codinha nor any member of his family, nor his ships captains ever engaged in anti-union talk or activities.
 - b) the Union did not adduce any evidence of anti-union activities or discriminatory conduct on the part of Saco.
 - c) it is the evidence of those employees who attended the end of April, 1986 "shanty" meeting (all grievors were in attendance) that Mr. Codinha stressed the right of all employees to the free personal choice to join or not join a union and pleaded for the restoration of the peaceful relations that previously existed.

PERSONNEL ADMINISTRATION

7. The Applicant would have the Board believe that two changes in personnel administra-

tion were part of an improper plan to "...refuse to employ..." the grievors. With the advent of the union upon the Great Lakes scene it is understandable that employers would, in the ordinary course of business, review and clarify the status of employees both at the end and at the beginning of each fishing season.

8. The first of the two changes placed in evidence was the "Reason for issuing this record" under section 14 of the Unemployment Insurance Record of Employment Form. Recording the reason for the termination of employment as "End of Contract" rather than "Lack of Work" more closely identifies the reality of the employment relationship and more accurately reflects the nature of the transaction, and was undertaken by Mr. Codinha on the advice of Counsel.

9. As was testified to by Union witnesses the change referred to in the fore-going paragraph did not affect the employees ability to apply for and qualify for unemployment insurance benefits. Of significance here is the fact that all of the Record of Employment forms issued to cover the termination of work at the end of the 1986 fishing season read "End of Contract", all employees were treated in the same manner.

10. In regard to the application for employment forms evidence suggests that the institution of a formal written document, which again was undertaken by Saco on the advice of Counsel, was a routine change to confirm, in writing certain conditions of employment that had been previously understood to exist.

STATUS OF EMPLOYMENT

11. It is clear that at the end of each fishing season, including that of 1986, Saco's crew members were laid off for legitimate reasons and they qualified for and subsequently received unemployment insurance benefits-they were in fact unemployed.

It is also clear from the Minutes of the 17 October, 1986 management meeting that at the end of the 1986 season "... the captains were asked that when the crew ask for next season's job to tell them that we cannot confirm employment at this time ..."

To assert, as the Union does, that each and every crew member had a right to expect to be hired for the 1987 season flies in the face of past practice and the respondent's evidence that jobs could not be confirmed because of pending business matters.

The history of employment at Saco shows that crew members did not return automatically for the following season. The number of boats operated by Saco was reduced from seven (7) at the beginning of 1983 to two in 1987 (including one vessel which tragically sunk in 1983). In order to adjust to the smaller number of craft operating, Saco reduced its work force for the 1984 season and continued this practice for the 1987 fishing season.

12. The evidence supports the respondent's assertion that crewmen were hired for each fishing season only and that at the end of each season the employment relationship terminated and there was no obligation on Saco to re-employ any crew member, just as there was no obligation upon crew members to return to Saco. The Record of Employment forms issued at the end of the 1986 fishing season significantly record the "First Day Worked" under section 9, for each fisherman employed in that year *to be a date in 1986* in spite of the fact that all of those employed had worked for Saco in previous fishing seasons - giving credence to the respondents assertion that crewmen were re-hired at the beginning of each season.

CONFIRMATION OF JOBS

13. The evidence makes it abundantly clear that there existed in the Great Lakes Fishing Industry a well-known, well-understood and well-established practice requiring fishermen, at the end of each season, to confirm their job status for the following season with their captains, and/or employers.

14. The evidence of a number of witnesses including that of Mr. John Batista one of the Union's own witnesses, and the compelling testimony of Messrs Edward John Penner and Laverne Kelly, shows that such a practice clearly existed, however informal may have been its execution, throughout the great lakes fishing industry.

15. It would be expected given the nature of Mr. Codinha's management philosophy that a formal written practice would not be in effect at Saco, but except for the grievors whose testimony in this respect I did not find to be convincing, all other Saco crew members and company witnesses who testified in this regard clearly confirmed the existence of the practice.

16. At the end of the 1986 season, no jobs were confirmed and the onus then was placed upon those fishermen who were interested in being re-employed to ascertain their status for the 1987 season.

17. The evidence clearly shows that prior to the hiring of the complement of crew members required for the 1987 season not one single grievor communicated in any manner with Saco Fisheries or any of its officers or captains, signifying their interest in returning to work for Saco for the 1987 season. Of paramount significance is the testimony of Mr. Adriano Codinha that he did not initiate contact with any of the crew members who were hired. It is Mr. Codinha's uncontradicted testimony that each and every crew member hired for the 1987 season applied for a job of his own volition.

18. Why then did the seven grievors not apply, to be re-hired for the 1987 fishing season? It was clearly established that confirmation of work for any season depended, initially, upon a previous communication by each Saco crew member with a member of Saco management. The attempt to organize Saco took its toll in deteriorating relationships - one manifestation was the grievors behaviour in discontinuing normal social contact with those persons at Saco with whom they would be required to communicate if in fact they wished to be rehired for the 1987 season. Having effectively removed themselves from consideration for the 1987 season by not communicating their desire to be considered for such work, the grievors became the authors of their own misfortune.

19. There is no evidence whatsoever that any of the grievors were at any material time refused employment.

20. For the reasons stated above, I would find that since the grievors by their own admission did not apply for re-employment, a conscious act of their own choosing, and that those fishermen who were hired did in fact apply, there is then no violation of section 66(a), for the reason stated by the union in its pleading that the employer "...refused to employ or continue to employ each of the grievors...".

EXPANDED PLEADINGS

21. I have strong reservations about the Board enlarging upon the alleged violations of the Act - particularly after the hearings have ended and all the evidence has been adduced. The

respondent answered the allegations as pleaded by the applicant and the Board received evidence and heard submissions and argument on the basis of the original pleading.

22. I disagree with the majority decision that having found that a party's case fails, in that they have not proven a violation of a specific provision of the Act, that the Board has an obligation to apply the evidence to other provisions of the Act that it considers have been violated but which have not been pleaded by the applicant.

23. In paragraph 12 of the majority decision reference is made to a *New Ontario Dynamics Limited* case. The issue in that case centered on the fact that the complainant failed to cite any sections of the Act allegedly contravened by the respondent. In this, the Saco case, the Union very specifically pleaded a violation of the Act viz., that the respondent failed to "...employ or continue to employ...".

The Board in its efforts to ensure fairness to all parties appearing before it as reluctant to permit complainants to alter pleadings, even during the course of a hearing, yet here we find that it is not at the request of the applicant that the pleadings are amended, but on the initiative of the Board.

24. Also in paragraph 12 of the majority decision reference is made to a Genaire case and comments made by McRuer, C.J.H.C. Again, I do not find this reference to be persuasive in this instant case. Justice McRuer made his ruling on the basis that "...some technical formality in the framing of the application" should not prevent an applicant from being granted relief. There is no such technical formality with which the Board has to deal in this instant case, the Applicant having very clearly chosen the grounds upon which it presented and argued its case.

25. There is no provision in the *Labour Relations Act* nor in the Board's jurisprudence requiring the Board to search the Act and enlarge upon, in each and every application, or to extend the pleadings of any of the parties. Surely Mr. Justice McRuer's words are not meant to impose such an onerous undertaking upon the Board. Yet I see the effect of the majority decision by including the "discrimination" issue in the pleadings as requiring just that.

26. It is my view that the majority decision to reject the union's application on the grounds that they did not make their case on the basis pleaded, but are found by the Board to be successful on other grounds introduced by the Board after the hearings have been completed - is prejudicial to the respondent.

27. The majority bases its decision supporting the "discrimination" proposition on their belief that Mr. Codinho knew that the seven grievors were Union members. Mr. Codinho did not deny knowing that the grievors were Union members, he testified that he could not be certain. It would not be surprising if Mr. Codinho did indeed assume that certain individuals were Union members given the two certification applications; the public admission by at least one grievor; and the anti-company behaviour of a number of other grievors; and the polarization that took place in the community -- but it cannot be inferred that because Mr. Codinho may have been aware of their union status and that they are not now working for Saco, that their union membership is the reason. The inference which I believe can be drawn is that the grievors never expected to be hired because they had behaved in a manner which upon reflection they believed disqualified them from consideration for employment and therefore they chose not to apply for the 1987 fishing season.

28. Having found that the grievors were the shapers of their own destinies and totally responsible for their not being re-employed for the 1987 season, I would find that the Union's case fails on the "discrimination" grounds as well.

REMEDY

29. The remedy contained in the majority decision is excessive in my view. The respondent had need for only fourteen crewmen for the 1987 fishing season - a reduction of seven from the end of the 1986 fishing season due to the placing of the *Miss Nicole II* in drydock. Had any of the grievors applied and had any of them been hired, then a corresponding number of those fishermen who were hired would not have been re-employed by Saco and the respondent's operation would at all the material times have been run with only fourteen crew members.

30. The effect of the majority decision is to burden the respondent with enormous costs for periods (both the full 1987 fishing season and part of the 1988 fishing seasons) when the operation clearly required the services of only fourteen crewmen and when the Board has found that the removal of the one vessel, necessitating a reduction in crew members, was done for legitimate business reasons.

31. At the most, I believe the remedy should apply the reasoning and the remedy contained in *Peralta Foods*, (File No. 1573-86-U), where the Board found that given the fact that there were no jobs for the grievors to return to, compensation rather than reinstatement was the appropriate remedy. The Board in the *Peralta* case, *idem*, went on to say:

... On the basis of the circumstances described above, we have concluded that it is far from certain that the "Ilda C" would have fished during the 1987 fishing season even if the grievors had not joined the Union. *Moreover, it is clear from the evidence adduced before us that captains and crew members often leave one boat at the end of a fishing season and go to work on another boat during the next fishing season.* Thus, it is questionable whether the grievors would have worked for the Company during 1987 in any event.

[emphasis added]

In this case the grievors also have no job to return to without displacing current crew members. The grievors do not have any right to a job and there are no jobs to which they could in fact be reinstated, and as they have not been deprived of work any "remedy" is therefore not appropriate.

32. What the majority decision fails to take into account in ordering the defined compensation for all of the seven grievors, is the fact that had all of the seven grievors applied for jobs the respondent would have had to select *only fourteen* crew members from the twenty-one applicants. It is possible that following the application of a variety of selection criteria - which the respondent had every right to do under the circumstances - all, or some, or none of the grievors would not have been hired in any event. Legitimate considerations such as: years of service in the fishing industry; years of service with Saco; relative merits of job performance; ability to function effectively as a member of a ship's crew; - could have eliminated some or all of the grievors from contention.

SUMMARY

33. In summary then I would dismiss the application on the grounds that:

- a) the Union failed to prove a contravention of the Act as alleged and that the employer did not in fact "... refuse to employ or continue to employ each of the grievors" as specifically stated in the Schedule attached to the Union's complaint dated 16 April, 1988.
- b) i) I do not support the majority decision conclusion that the Board's jurisprudence or practices or the *Labour Relations*

Act itself gives the Board the right as stated in paragraph 11 "... to find that a section or portion of a section that has not been pleaded by a party has been contravened if the evidence supports such a finding." Under section 72(1), Regulation 546, Rules of Procedures, it is explicitly clear that -- among other matters:

"... and where he alleges that this improper or irregular conduct constitutes a violation of any provision of the Act, *he shall include a reference to the section or sections of the Act containing such provisions*". (emphasis added)

The Union was very specific in meeting its obligations in this regard; the evidence was adduced and testimony rendered on the basis of the allegation contained in the written formal complaint;

- ii) Notwithstanding my objection to the expansion of the applicant's pleadings by the Board, I would find, for reasons contained in this dissent that the respondent did not "... discriminate against a person in regard to employment or any term or condition of employment ..." as prohibited under section 66(a) of the Act.
- c) Having dismissed the application there would of course be no need for a remedy but since this majority has found the respondent liable for damages, I believe that the remedy should be limited to the 1987 fishing season only, and compensation should be ordered to be paid only to those grievors who, under an agreed-to formula of employment criteria, may have been hired for that one season only.

1386-88-R Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. **Southern Express Lines of Ontario Limited**, Respondent

Certification - Practice and Procedure - Whether Board should refuse to entertain a subsequent application for certification filed by a previously unsuccessful applicant - First application dismissed when applicant took position that the Canada Board had jurisdiction - Second application withdrawn after applicant forgot to file its membership evidence - Board entertaining third application - No indication of abuse of Board's processes - No evidence establishing "special circumstances" which would lead Board to refuse to entertain application - Certificate issuing

BEFORE: Owen V. Gray, Vice-Chair, and Board Members R. W. Pirrie and H. Peacock.

APPEARANCES: Eric del Junco, Al LeFort and Jim O'Donnell for the applicant; Donald J. McKillop, George Toperczer and Marty Tribble for the respondent.

DECISION OF THE BOARD; October 20, 1988

1. This is an application for certification. The applicant originally named "G & W Freightways Ltd. Southern Express Lines Ltd." as respondent. Having regard to the agreement of the parties, the title of this proceeding has been amended to describe the respondent as "Southern Express Lines of Ontario Limited".

2. The respondent took the position that the Board should decline to entertain this application. The Board's authority to do so is found in clause (i) of subsection 103(2) of the *Labour Relations Act* ("the Act"), which provides that

103.-(2) Without limiting the generality of subsection (1), the Board has power,

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to *refuse to entertain a new application by an unsuccessful applicant* or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees *within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.*

[emphasis added]

For the most part, the facts on which the respondent relies in support of its request are not in dispute.

3. On June 3, 1988 the applicant filed an application for certification (Board File 0588-88-R) with respect to the unit of employees affected by the application now before us. At the same time, it filed a similar application with the Canada Labour Relations Board ("the CLRB"). The applicant initially advised both labour relations boards that it felt that labour relations between the respondent and the subject employees was a matter which fell within provincial jurisdiction. In its replies to both applications, the respondent took the position that its labour relations with the affected employees did, indeed, fall within provincial jurisdiction. Board File 0588-88-R was scheduled for hearing July 8, 1988. The CLRB held the application before it in abeyance.

4. On July 6, 1988, the applicant's counsel wrote to both labour relations boards to advise that the applicant had changed its position and was at that point taking the position that labour relations between the respondent and the subject employees fell within federal jurisdiction. He asked that the application before this Board be adjourned *sine die*, and that the CLRB commence processing the application which had been filed with it. Counsel for the respondent opposed the applicant's request that the application before this Board be adjourned *sine die*. That application came on for hearing before another panel of this Board on July 8, 1988. That panel then ruled orally that "since the applicant's position is that this Board has no jurisdiction to entertain this application, the Board is satisfied that it should be dismissed." That ruling was confirmed in writing on July 15, 1988.

5. Following the applicant's letter to it of July 6, 1988, the CLRB began processing the application which had been filed with it. The respondent was required to and did file certain material with the CLRB, including a list of its employees and their job classifications and a "brief" elaborating its claim that its labour relations fell within provincial jurisdiction. The CLRB gave the applicant copies of that material.

6. On August 17, 1988, the applicant filed a second application with this Board (Board File 1182-88-R) for certification with respect to the employees which are now the subject of the

application before us. By letter dated August 19, 1988, counsel for the applicant advised the CLRB that “[u]pon reviewing the materials filed by the respondent and further investigating the respondent’s operations” the applicant had decided to reapply to this Board and was requesting that the application before the CLRB be held in abeyance pending this Board’s determination. On August 22, 1988, the CLRB decided to hold the application before it in abeyance until September 30, 1988. This prompted counsel for the respondent to complain to the CLRB about its having twice adjourned the application before it without in either case having first solicited his client’s submissions.

7. The terminal date in the applicant’s second application to this Board came and went without the applicant’s having filed the membership evidence on which it relied, despite the requirement of section 73 of this Board’s Rules of Procedure. The respondent filed the material required of it. The application was scheduled for hearing September 9, 1988. By letter delivered to this Board by hand in late afternoon on September 6, 1988, the applicant requested leave to withdraw this second application. The applicant did not advise the Board of the reason for the request at the time it was made. That is not unusual, since the Board ordinarily focuses only on the timing of the request in deciding whether to grant it: see Practice Note No. 7. During our efforts to ascertain the facts without the necessity of formal proof, its counsel told us that the applicant had made the request upon realizing that (and because) it had forgotten to file its membership evidence by the deadline. This was not repeated under oath nor, before argument, did counsel for the respondent suggest that it had to be.

8. By telegram dated September 7, 1988, the Registrar advised the parties that, in view of the applicant’s request to withdraw, the hearing scheduled for September 9, 1988 had been cancelled. By decision dated September 8, 1988, another panel of this Board granted the applicant leave to withdraw the application. In the meantime, on September 7, 1988, the applicant filed the application now before us. On September 9, 1988, the applicant wrote to the CLRB requesting leave to withdraw the application then before that Board.

9. As a matter of constitutional law, the regulation of labour relations with respect to employees involved in the transport of goods by truck may fall either within federal or provincial jurisdiction, depending on the nature of the employer’s operations. Those determinations can be difficult, and can turn on facts of which the employees and their trade union may well have no knowledge. Counsel for the respondent is not critical of the applicant’s initial confusion about the proper forum in which to bring its application. He argued, however, that the multiplicity of applications here gave rise to a “possibility of manipulation” with respect to the gathering and filing of membership evidence. Counsel particularly emphasized the fact that before filing the application now before us, the applicant had been able to obtain a list of employees of the respondent in the course of the proceedings before the CLRB. He argued that this Board has a “principle” of maintaining secrecy of employee lists, which principle had been violated by the course taken by the applicant. He also argued that the Board should be suspicious of the circumstances of the withdrawal of the immediately preceding application in Board File 1182-88-R. He submitted that it was hard to believe that this trade union would have merely forgotten to file the necessary membership evidence. Making reference to the Board’s decision in *Mathias Ouellette*, 56 CLLC ¶18,026, he argued that the applicant had to establish “special circumstances”, and that its failure to lead evidence with respect to the reasons for its withdrawal of the application in Board File 1182-88-R should therefore result in the Board’s declining to entertain this application.

10. Our review of Board File 0588-88-R revealed that the membership evidence originally filed in connection with that application had consisted of 17 combination applications for membership and receipts. Although the documents themselves were returned to the applicant on or about

August 5, 1988, the names of the persons who apparently signed those documents can be ascertained from material which remains in the file. Seventeen combination application for membership and receipt documents have been filed in support of the application now before us. All 17 documents are dated either June 1 or June 2, 1988. The names of the persons who appear to have signed these documents correspond precisely to the names of the persons who appear to have signed the membership evidence which was filed originally with Board File 0588-88-R. Accordingly, it appears that the documentary evidence of membership evidence on which the applicant relies in this application concerns membership of which the applicant had documentary evidence before any “possibility of manipulation” arose. These facts were drawn to the attention of counsel for the respondent in the course of his submissions. His response was that the “possibility of manipulation” on which he relied should result in our declining to entertain the application now before us even if we were satisfied that no advantage had been taken of that possibility in this case.

11. The Board’s approach to the exercise of its discretion under clause 103(2)(i) (then section 92(2)(i)) was described succinctly in *Repac Construction & Materials Limited*, [1978] OLRB Rep. Jan. 91 at paragraph 7:

7. As a general principle the Board is quite reluctant to either bar, or refuse to entertain, a subsequent application for certification filed by a previously unsuccessful applicant. Indeed, such action is usually only taken either where employee desires have been tested by a representation vote in which the union failed to receive sufficient support to be certified (See: *Campbell Soup Company Ltd.*, [1976] OLRB Rep. Feb. 1091), or where the union has sought to avoid an unfavourable vote result by withdrawing its application following the ordering of such a vote. (See: *Mathias Ouellette* 56 CLLC ¶18,026). Exceptional circumstances may, however, also lead to the Board invoking the provisions of section 92(2)(i) in other situations. The leading example of this is the *J. W. Crooks Company* case, [1972] OLRB Rep. Feb. 126, where “in light of the special and extreme circumstances confronting the Board”, namely four unsuccessful applications for certification made by the same applicant in a little over three months, the Board imposed a six month bar on any future applications by the same applicant. In its consideration of any request pursuant to section 92(2)(i), the Board, concerned that the wishes of employees be given effect to, has always been careful not to use its authority under that section merely to punish an unsuccessful applicant union, even in those instances where the union may have engaged in previous irregular or improper conduct. (See: *Fruehauf Trailer Company of Canada Limited* [1974] OLRB Rep. Jan. 6.).

The alleged “irregular or improper conduct” with which the *Fruehauf Trailer* decision dealt was the submission in a prior application of membership documentation purporting to evidence payments which had not in fact been made, something which the Board there was prepared to characterize, for the sake of analysis, as a “fraud on the Board.”

12. While the *Fruehauf Trailer* decision and others may weigh against the proposition, we are prepared to accept for the sake of this analysis that an applicant’s “abuse of the Board’s process” in prosecuting a prior unsuccessful application may be a relevant consideration in exercising the discretion afforded by section 103(2)(i). There is, however, no “principle” of maintaining secrecy of employee lists in proceedings before this Board. Natural justice requires that any such list be revealed to an applicant at an appropriate point before the Board disposes of any issue to which the contents of the list are relevant: *Kitchener-Waterloo Hospital*, [1988] OLRB Rep. Apr. 406; *Metropolitan Separate School Board*, [1986] OLRB Rep. Dec. 1733; *Nova Scotia Michelin Tire Employees’ Local 1699 v. Nova Scotia Labour Relations Board*, 86 CLLC ¶14,009 (N.S.S.C.); and, *Airline Limousine*, [1985] OLRB Rep. Jan. 1. The mere fact that an applicant obtained information to which it was entitled in the course of its pursuing an ultimately unsuccessful certification application could not alone amount to an abuse of this Board’s process. In the absence of a statutory provision giving a union an independent right to such information, however, it could be argued that it would be an abuse of this Board’s process for a union to prosecute a certification

application which it knows has no prospect of success for the sole purpose of obtaining names of employees in a bargaining unit targetted for organizing. We are not aware of any case in which that has occurred. It is unnecessary for us to determine whether there are any other circumstances in which an applicant's having obtained a list of employees in the previous proceeding before this Board would amount to an abuse of the Board's process. The question does not arise here. Neither of this applicant's two previous applications to this Board reached the stage at which it would ordinarily have received a copy of the employer's list, and there is no suggestion that the applicant did, in fact, obtain a list of employees of the respondent as a result of any use of this Board's process. It is not for us to say what would or would not constitute an abuse of the CLRB's processes, or to use our powers to police the use of those processes. In any event, we note again that the very substantial membership support on which the applicant relies in this application is the support it had when it filed its first applications in June, before there had been any "possibility of manipulation".

13. As for the argument the respondent based on the Board's decision in *Mathias Ouellette, supra*, it is important to observe that the prior unsuccessful application with which that decision dealt was one which had been *dismissed* because the applicant's request to withdraw it had been made after the Board had directed the taking of a representation vote. The onus contemplated by the decision in *Mathias Ouellette, supra*, does not apply unless the previous application had reached the stage at which a representation vote had been directed before the request to withdraw was made: see *Mount Sinai Hospital*, [1985] OLRB Rep. Dec. 1780, at paragraph 6. None of the applicant's previous applications before this Board had reached that stage; accordingly, any absence of evidence establishing "special circumstances" has no special significance here.

14. It is clear from the language of clause 103(2)(i) that its drafters considered an "unsuccessful application" to be one which has been dismissed. Board File 1182-88-R was not dismissed. It is unnecessary for us to deal in this case with counsel's submission that the Board should not have granted the applicant's request for leave to withdraw that application without first giving the respondent notice of the request and an opportunity to make submissions. Having heard his submissions, we are not persuaded that that application ought to have been dismissed. In this case, therefore, there is only one "unsuccessful application" to this Board prior to the one before us.

15. When counsel for the respondent concluded his argument with respect to the exercise of our discretion, for the reasons set out above we were not persuaded that we should refuse to entertain this application, and so advised the parties.

16. Following our oral ruling, representatives of the applicant and respondent met with a Labour Relations Officer, came to agreement with respect to matters remaining in issue and consented to the Board's issuing a decision in this matter based upon the submissions made and agreements reached, without an oral hearing before a panel of the Board.

17. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

18. Having regard to the agreement of the parties, we find that

all employees of the respondent in Metropolitan Toronto save and except supervisors, those above the rank of supervisor, mechanics, dispatchers, brokers, office and sales staff, employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period

constitute a unit of employees of the respondent appropriate for collective bargaining in this application.

19. We are satisfied on the basis of all the evidence before us that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 27, 1988, the terminal date fixed for this application and the date which we determine, under clause section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under subsection 7(1) of the Act.

20. A certificate shall issue to the applicant.

1874-86-R; 2268-86-U; 3123-86-R; 0616-87-M United Brotherhood of Carpenters and Joiners of America, Local Union 27, Applicant v. **Square One Carpentry Inc.**, Respondent; United Brotherhood of Carpenters and Joiners of America, Local 27, Complainant v. Labourers International Union of North America, Local 183 and Square One Carpentry Inc., Respondents; Labourers' International Union of North America, Local 183, Applicant v. Square One Carpentry and Square One Carpentry Inc., Respondents v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener; Square One Carpentry Inc., Employer v. United Brotherhood of Carpenters and Joiners of America, Local 27, Trade Union v. Labourers' International Union of North America, Local 183, Trade Union

Certification - Collective Agreement - Construction Industry - Membership Evidence - Reconsideration - Voluntary Recognition - Labourers Union asking Board to reconsider a certificate it had issued to the Carpenters Union on the basis that employer was bound at time to a collective agreement with the Labourers Union covering carpenters - Collective agreement held to be a bar - Parties may enter into valid voluntary recognition agreement at a time when there is only one employee - Employee signing membership card at same time as partners not constituting employer support for union - Contractor stating to subcontractor that he had to sign with the Labourers Union not constituting employer support when Union unaware of statement - Certificates revoked

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *D. A. MacDonald* and *N. Wilson*.

APPEARANCES: *David A. McKee* and *Luis Camara* for United Brotherhood of Carpenters and Joiners of America, Local 27; *L. A. Richmond* and *C. DeToni* for Labourers' International Union of North America, Local 183; *Michele DiBiase* and *Carmin DiBiase* for Square One Carpentry Inc.

DECISION OF THE BOARD; October 2, 1988

1. The Board has before it a number of related matters. In a decision dated October 22, 1986 (Board File No. 1874-86-R), the Board certified the United Brotherhood of Carpenters and Joiners of America, Local Union 27 ("Local 27") for all carpenters and carpenters' apprentices in the employ of Square One Carpentry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in Board Area #8,

save and except non-working foremen and persons above the rank of non-working foreman. Subsequent to the Board's decision certifying Local 27, the Labourers' International Union of North America, Local 183 ("Local 183") requested the Board to reconsider that decision and revoke Local 27's certificate on the grounds that it was a party to a collective agreement with Square One Carpentry Inc. covering carpenters and carpenters' apprentices which would bar Local 27's application and that it did not receive timely notice of Local 27's application for certification. Along with its reconsideration request, Local 183 alleges that the membership evidence filed by Local 27 in support of its application was obtained in a manner contrary to the Act and should not be given any weight by the Board. Board File No. 2268-86-U is a section 89 complaint in which Local 27 attacks the validity of the alleged collective agreement between Local 183 and Square One Carpentry Inc. and seeks a declaration that the alleged collective agreement is null and void. Board File No. 3123-86-R consists of an application by Local 183 under subsection 1(4) and section 63 of the Act against Square One Carpentry and Square One Carpentry Inc. Board File No. 0616-87-M is a reference from the Minister of Labour pursuant to section 107 of the Act concerning the question of whether Local 27 has bargaining rights for the employees of Square One Carpentry Inc. and whether Local 27's request for conciliation is proper.

2. The above matters were consolidated and heard by a panel composed of Vice-Chair K. Petryshen and Board Members J. Redshaw and J. Wilson. Before the panel could issue a decision, Mr. Wilson passed away. Based on a joint submission from the parties, the Board proceeded with these matters on the following basis. The parties were given the opportunity to call additional evidence and on the basis of that evidence and the evidence heard previously, Vice-Chair Petryshen produced a statement of fact. That statement of fact was submitted by the parties to the present panel as an agreed statement of fact.

3. Hearing days were set to entertain additional evidence and the parties made submissions with respect to what the facts are based on the evidence heard. M. DiBiase gave evidence on behalf of Square One Carpentry and Square One Carpentry Inc. Local 183 called P. Baldassarra, L. Baldassarra, J. Morgado and L. Mendes to testify. Local 27 did not call any evidence. After considering all of the evidence and the parties' submissions relating thereto, Vice-Chair Petryshen found the facts to be as follows:

- (1) Square One Carpentry was an entity which engaged in the business of house framing and was a partnership between M. DiBiase and R. Furlong. In September 1983, Square One Carpentry performed house framing work on a piecework basis pursuant to a subcontract with F.E.D. Construction Company ("F.E.D.") on a Greenpark Homes (the builder) site at Woodbridge, Ontario. Square One Carpentry had worked as a subcontractor of F.E.D. on and off since 1980-81 and for most of 1983.
- (2) Generally in 1983, there was little work for persons engaged in house framing. M. DiBiase believed that Greenpark Homes was one of the few builders constructing houses in 1983. The vast majority of F.E.D.'s work was performed by it as a contractor to Greenpark Homes. F.E.D. has a reputation of being one of the better contractors. Greenpark Homes is a trade name and it is used under licence by various joint ventures. The principals of F.E.D. are involved in these joint ventures from time to time when house framing is done. They were part of the joint venture constructing the housing devel-

opment at Woodbridge in 1983. Representatives of Local 183 were unaware of this joint arrangement.

- (3) In September 1983, Greenpark Homes was bound to a collective agreement between Local 183 and the Toronto Housing Labour Bureau. This collective agreement was made an exhibit in these proceedings. Attached and forming part of the collective agreement is the following Letter of Understanding:

LETTER OF UNDERSTANDING

Between:

Toronto Housing Labour Bureau

(the "Bureau")

- and -

Labourers' International Union of

North America, Local 183

(the "Union")

The Bureau and the Union agree that this Letter of Understanding forms part of the Collective Agreement between the Bureau and the Union dated the day of , 1983.

The Bureau and the Union agree that:

1. Article 1.03(a)(iii) concerning the subcontracting of frame carpentry work shall be read subject to the following conditions:
 2. a) No member employer of the Bureau will be required to break existing carpentry sub-contracts by reason that the carpentry subcontractor is not in contractual relations with the Union. This exemption will be effective up to December 31, 1983.
 - b) Within one (1) week of the signing hereof, each member employer agrees to provide the Union with a list of his existing carpentry sub-contracts, the location of the projects and the number of units to be constructed.
 - c) Any new carpentry sub-contracts will be let only to carpenters who have agreements with the Union.
 - d) The Union recognizes that there must be sufficient carpentry contractors with agreements with the Union for the maintenance of competitive bidding and a productive environment failing which members of the Bureau will not be bound to use only carpentry contractors who have agreements with the Union.

DATED at this day of , 1983.

TORONTO HOUSING
LABOUR BUREAU

LABOURERS' INTERNATIONAL
UNION OF NORTH AMERICA,
LOCAL 183

- (4) In September 1983, F.E.D. was party to a collective agreement with Local 183 which was entered into on July 15, 1983 (the Residential Housing Carpentry Agreement). The relevant provisions of this collective agreement are as follows:

ARTICLE 1 - RECOGNITION

1.01 The Employer recognizes the Union as the sole and exclusive bargaining agent for all employees of the Employer as outlined in Schedule "A" of this agreement engaged in the preparation of footings, the fabrication and erection of all phases of housing, save and except those persons above the rank of foreman, office, clerical and engineering staff, while working in and out of Board Area No. 8, specified by the Ontario Labour Relations Board as follows:

The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham.

1.02 This agreement shall apply to all residential housing construction employees such as carpenters, their apprentices and helpers, while working on and including single and semi-detached houses, maisonettes and town-houses.

ARTICLE 2 - UNION SECURITY AND CHECK OFF OF UNION DUES

2.01 All employees shall, when working in a position within the bargaining unit described in Article 1 hereof, be required, as a condition of employment, to be a member of or apply for membership in the Union and obtain a clearance slip from the Union as follows:

a) Where an employee is hired on Monday, Tuesday or Wednesday of any week, he shall apply for membership in the Union and obtain a clearance slip from the Union by no later than the following Saturday;

b) Where an employee is hired on Thursday or Friday of any week, he shall apply for membership in the Union and obtain a clearance slip from the Union by no later than the second Saturday following,

and shall be required to maintain such membership while working within the bargaining unit for the duration of this agreement. The Union agrees that it will not refuse membership to any person who applies.

2.05 All bargaining unit work normally performed by the classifications of

employees listed in the attached Schedule "A" shall be performed only by members of the bargaining unit.

ARTICLE 14 - SUBCONTRACTING OF WORK

14.01 The Employer agrees not to subcontract work coming within the jurisdiction of this Collective Agreement to subcontractors other than those who are in contractual relations with the Union, Local 183.

14.02 The Union agrees that the Employer may continue the practice in effect immediately prior to the commencement of this Agreement, of utilizing piece-workers to perform bargaining unit work, so long as the person concerned agrees, in which event the Employer shall comply with Article 6. of Schedule "A" of this agreement in regard to the remittances as outlined, for bargaining unit employees performing piece-work; or such other arrangements as are mutually agreeable to the parties.

SCHEDULE "A"

ARTICLE 1 - HOURS OF WORK AND OVERTIME

1.01 a) The standard hours of work for all employees shall be based on forty-four (44) hours per week exclusive of travelling time to and from the job.

b) All overtime work performed in excess of nine (9) hours per day, Monday to Thursday and eight (8) hours on Friday, and all Saturday work, shall be paid at the rate of time and one-half the regular rate.

1.02 In the event of inclement weather during the regular working week, the Employer may perform work on Saturday at the regular wage rate.

ARTICLE 2 - VACATION PAY

2.01 The Employer agrees to pay as vacation and holiday pay an amount equal to 8% (eight per cent) of gross wages earned, payable on or before the fifteenth day of July in each year; it being understood that 4% (four per cent) is in lieu of statutory holidays and 4% (four per cent) is in lieu of vacation pay.

ARTICLE 3 - MAINTENANCE OF EXISTING RATES

3.01 It is agreed that no employee covered by this Collective Agreement shall receive a reduction in his rate of wages through the introduction of this schedule.

ARTICLE 4 - PAYMENT OF WAGES

4.01 Employees shall be paid weekly or bi-weekly maximum, by cheque or cash at the option of the Employer, no later than Thursday in any week, and the employees' pay shall be accompanied by a slip outlining all hours of work, overtime hours, deductions for income tax, unemployment insurance, pension, Ontario Health Insurance Plan (OHIP) etc., where applicable.

4.02 In the case of layoff, all men shall receive two hours' notice or two hours' pay in lieu thereof, in advance of the layoff.

4.03 Whenever Unemployment Insurance Separation Certificates and Ontario Health Insurance Plan Form 104 and pay cheques and vacation pay monies are not given to the employee at the time of termination, they shall be sent by the Employer to the employee by registered mail, to his last known address on file with the Employer, within seventy-two (72) hours of the time of termination.

ARTICLE 5 - TRAVELLING AND ROOM AND BOARD ALLOWANCES

5.01 *Zone 1* is a free travel zone as outlined on pages 14 and 15.

Zone 2 - An employee required to work in *Zone 2* shall receive a per diem payment of a sum equal to six dollars (\$6.00) per day.

Zone 3 - An employee required to work in *Zone 3* shall receive a per diem payment of a sum equal to eight dollars (\$8.00) per day.

N.B. Travelling zones outlined on pages 15 and 16.

5.02 Whenever employees covered by this Agreement are required to be away from their normal place of residence overnight, the Employer agrees to pay twenty-five dollars (\$25.00) per day, to a maximum of one hundred and twenty-five dollars (\$125.00) per week, to cover room and board. Effective October 1, 1983, the Employer agrees to increase the daily allowance to thirty dollars (\$30.00) per day, to a maximum of one hundred and fifty dollars (\$150.00) per week, or alternatively, the Employer will provide at his own expense, suitable room and board accommodation for the employees.

ARTICLE 6 - WELFARE PLAN AND REMITTANCES

6.01 Commencing June 1, 1983, the Employer agrees to pay the sum of 75¢ (seventy-five cents) per hour based on 130 (one hundred and thirty) hours per month, into Local 183 Members' Benefit Fund, for the purpose of purchasing weekly indemnity, life insurance, major medical, dental care, Ontario Hospital Insurance Plan coverage, or similar benefits for the employees covered by this agreement, represented by Local 183.

6.02 The Employer shall pay remittances, as specified in this agreement, on behalf of its employees who have worked for the Employer more than six (6) days in the month.

6.03 In the event that the cost of providing O.H.I.P. coverage is increased during the term of this agreement, the Employer agrees that the remittances as outlined above will be increased accordingly, upon notification in writing by the Union as to the date such increase is effective.

6.04 The prime contractor or Employer shall be responsible before final payment is made to any subcontractor that all remittances for welfare and union dues are up to date in payment, in accordance with the terms of this agree-

ment, it being understood that the said subcontractor shall be required to provide a letter from the Union confirming that payments are made.

6.05 In the event the prime contractor or Employer makes final payment to any subcontractor and such subcontractor is delinquent in remittances as outlined in this agreement, then the prime contractor or Employer shall be responsible for payment to the Welfare Fund or the Union for all outstanding monies owed.

6.06 The prime contractor or Employer shall advise its subcontractors in writing that final payment for work performed is being withheld pending receipt of a letter from the Union confirming that all remittances are paid in accordance with the terms of this agreement.

6.07 Payments into the Welfare Fund are to be made by the 15th day of the month following the month for which payment was made.

6.08 The parties hereto acknowledge that they are familiar with the contents of the Agreements and Declarations of Trust establishing the said Local 183 Members' Benefit Fund and they agree to be bound by the terms and conditions of the said Agreements and Declarations as if original parties thereto and as if the same formed part of this Collective Agreement. In the event any of the terms and conditions of the said Agreements and Declarations are in any way altered, added to or amended, then the parties to this Collective Agreement shall be bound by the same as if original parties thereto and as if the same formed part of this Collective Agreement. The Chairman of the Board of Trustees shall notify each contractor signatory to this Collective Agreement, by registered mail, of any amendments or alterations to the said Agreements and Declarations.

ARTICLE 7 - STATUTORY HOLIDAYS

7.01 The following are recognized by the Employer as Statutory Holidays:

New Year's Day	Civic Holiday
Good Friday	Labour Day
Victoria Day	Thanksgiving Day
Dominion Day	Christmas Day
	Boxing Day

and any other holiday proclaimed as a holiday with pay by the Provincial or Federal Government.

7.02 Overtime at the rate of double the employee's current hourly rate shall be paid to all employees covered by this Agreement for all work performed on Sundays and Statutory Holidays.

ARTICLE 8 - WAGES AND CLASSIFICATIONS

The following hourly wage rates shall apply:

	Effective <u>Jan 4/83</u>	Effective <u>Oct 1/83</u>	Effective <u>May 1/84</u>	Effective <u>Oct 1/84</u>
Job Foreman	\$14.00	\$14.25	\$14.50	\$15.00
Crew Leader	\$13.00	\$13.25	\$13.50	\$14.00
Carpenter	\$12.00	\$12.25	\$12.50	\$13.00
3rd Yr.				
Apprentice	\$11.00	\$11.25	\$11.50	\$12.00
2nd Yr.				
Apprentice	\$ 9.50	\$ 9.75	\$10.00	\$10.50
1st Yr.				
Apprentice	\$ 7.50	\$ 7.75	\$ 8.00	\$ 8.50
General				
Labourer	\$11.00	\$11.25	\$11.50	\$12.00

ARTICLE 9 - TRAVELLING ZONES

- (a) Zone 1 - is the geographic area bordered by Hwy. No. 9 on the north, Hwy. No. 25 on the west, and Brock Street on the east.
- (b) Zone 2 - is the geographic area bordered by Hwy. No. 89 on the north, Brock Street on the east, Hwy. No. 9 on the south, and Hwy. 25 on the west.
- (c) Zone 3 - is the geographic area north of Hwy. No. 89 on the north, Hwy. No. 25 on the west, Brock Street on the east, and Hwy. No. 89 on the south.

N.B. - See map, travelling zones, page 15.

LETTER OF UNDERSTANDING

This Letter of Understanding forms part of the Collective Agreement between F E D CONSTRUCTION COMPANY

and Labourers' International Union of North America, Local 183, dated the 15th day of July, 1983.

The parties to the Collective Agreement are agreed that all self-employed Piece Workers who perform work covered by, or falling under, the Collective Agreement shall be signatories to an Agreement with Labourers' International Union of North America, Local 183, and shall be:

1. Members in good standing of Labourers' International Union of North America, Local 183; and
2. In good standing with regard to their contributions to the Local 183 Members' Benefit Fund.

DATED at Toronto this 15th day of July, 1983.

F E D CONSTRUCTION
COMPANY

LABOURERS'
INTERNATIONAL UNION
OF NORTH AMERICA,
LOCAL 183

"Illegible"

"Illegible"

"Illegible"

(5) Prior to September 26, 1983, a representative of F.E.D. told M. DiBiase that he had to sign with Local 183 or he could not work on any of Greenpark Homes' sites. M. DiBiase had an association with the form carpentry industry for a number of years and he was familiar with the ongoing competition between Local 183 and Local 27 for members. M. DiBiase was aware of the fact that F.E.D. had signed a contractor's collective agreement with Local 183.

(6) On September 26, 1983, the partnership Square One Carpentry was an employer with one employee, P. Arsenault, who was paid on an hourly basis. During the work day of September 26, 1983, Peter Baldassarra, a business agent of Local 183, attended at the Greenpark Homes site at Woodbridge. P. Baldassarra knew that Local 183 had a collective agreement with F.E.D. that contained a standard subcontracting clause and his purpose in attending at the Greenpark Homes site was to ensure that the terms of the F.E.D. collective agreement were being complied with. His general approach was to attempt to sign up the workers as members in order to put them in good standing and then to attempt to sign a collective agreement with the relevant entity. On September 26, 1983, M. DiBiase, R. Furlong and P. Arsenault became members of Local 183 when they signed membership cards in each others presence at the same time after being approached by P. Baldassarra. After becoming members of Local 183, M. DiBiase and Furlong signed Local 183's Residential Housing Carpentry Agreement on behalf of Square One Carpentry and P. Baldassarra signed on behalf of Local 183 ("the first agreement"). This agreement, which is identical to the F.E.D. collective agreement, was entered into on September 26, 1983 and made an exhibit in these proceedings. On September 26, 1983, P. Baldassarra was not aware of the Letter of Understanding referred to in paragraph (3) herein.

(7) Both M. DiBiase and Furlong were active on the site in that they performed carpentry work. In the house framing industry it is not unusual for the principals of a subcontractor to perform carpentry work and be members of a trade union. The standard Local 183 collective agreement at the time provided that self-employed pieceworkers who perform work covered by the collective agreement shall be signatories to an agreement with Local 183, shall be members in good standing of Local 183 and shall be in good standing with regard to their contributions to Local 183's Members' Benefit Fund.

(8) On September 26, 1983, M. DiBiase did not feel threatened in any way by any representative of Local 183. He did not want to sign an agreement with Local 183, but decided to do so. M. DiBiase also understood that if he did not work as a subcontractor to F.E.D., Square One Carpentry would be

unable to secure a contract with other contractors of Greenpark Homes. When asked to sign an agreement with Local 183, M. DiBiase recognized that, as a practical matter, he had two choices. He could walk off the site and seek work somewhere else or sign a collective agreement with Local 183 and keep working as a subcontractor to F.E.D.

(9) In January 1984, after discussions with his accountant, M. DiBiase incorporated a company by the name of Square One Carpentry Inc. The first directors were M. DiBiase, his brother Carmine and R. Furlong. Shortly after the incorporation, Furlong's involvement with Square One Carpentry Inc. ceased. From a practical point of view, the incorporation did not alter the nature of the business. Square One Carpentry ceased to exist and Square One Carpentry Inc. became involved in the business of performing work in the house framing industry under the control of M. DiBiase. M. DiBiase did not take the position with Local 183 that Square One Carpentry Inc. was not bound to the agreement signed with Local 183 by representatives of Square One Carpentry. Beginning in February 1984, the remittance forms sent to Local 183's administrator were in the name of Square One Carpentry Inc.

(10) The agreement between Square One Carpentry and Local 183 expired on April 30, 1985. By letter dated May 23, 1985, the parties were advised that the Minister of Labour appointed a conciliation officer and by letter dated June 24, 1985, the parties were informed that the Minister decided not to appoint a Board of Conciliation (commonly referred to as a "no board report").

(11) During February 1986, Square One Carpentry Inc. performed house framing work on a piecework basis pursuant to a subcontract with Laurier Homes, a builder. At the relevant time, Laurier Homes was bound to a collective agreement between Local 183 and the Toronto Housing Labour Bureau. The relevant provision of this collective agreement, which was made an exhibit in these proceedings, is Article 1.03(a):

1.03(a) The Employer agrees to sublet the following work only to Contractors who are in contractual relations with the Union:

- i) Basement forming;
- ii) Concrete and Drain;
- iii) Frame Carpentry.

(12) Approximately a week prior to February 11, 1986, a representative of Laurier Homes met with M. DiBiase at the offices of Laurier Homes. At this time, Square One Carpentry Inc. had completed about five houses pursuant to its contract with Laurier Homes. The representative advised M. DiBiase to sign an agreement with Local 183 or get off the job.

(13) During the work day of February 11, 1986, P. Baldassarra, along with another representative of Local 183, M. Lago, attended at the Laurier Homes job site where Square One Carpentry Inc. was performing work. In

discussions with M. DiBiase, P. Baldassarra referred to the no board report and to the collective agreement Local 183 had that bound Laurier Homes. He also advised M. DiBiase that he would have to sign an agreement if he wanted to stay on the job. At this time, Square One Carpentry Inc. employed a few employees but P. Baldassarra made no attempt to get them to sign membership cards on that day, but signed them on a subsequent occasion in the back of a van in the presence of M. DiBiase. On February 11, 1986, M. DiBiase and C. DiBiase signed Local 183's Residential Housing Carpentry Agreement on behalf of Square One Carpentry Inc. and P. Baldassarra and M. Lago signed on behalf of Local 183 ("the second agreement"). This agreement remained in effect until April 30, 1987 and was made an exhibit in these proceedings. In signing the agreement on February 11, 1986, M. DiBiase was primarily motivated by a desire to keep Square One Carpentry Inc.'s contract with Laurier Homes.

(14) In the spring of 1986, the Metropolitan Toronto area began to experience the start of a housing boom. M. DiBiase was unable to obtain from Local 183 the number of persons Square One Carpentry Inc. needed. In September 1986, and for a number of months thereafter, Square One Carpentry Inc. performed house framing work pursuant to a subcontract with Landford Developments Ltd. During this period of time, Landford Developments Ltd. was a party to a collective agreement with Local 183.

(15) In early September 1986, a representative of Local 27 approached M. DiBiase on a job site and asked him if Local 27 could supply him with some crews. M. DiBiase and his brother made the decision to go with Local 27 and M. DiBiase advised the Local 27 representative that he could send crews consisting of Local 27 members to Square One Carpentry Inc. Local 27 did send such crews to Square One Carpentry Inc. It was understood that while the Local 27 members worked for Square One Carpentry Inc., the company would remit benefit trust fund contributions and working dues on their behalf. Square One Carpentry Inc. did remit such amounts for at least the months of September, October and November 1986. Square One Carpentry Inc. did not enter into a collective agreement with Local 27. If Square One Carpentry Inc. had been able to secure Local 183 members, it would have remitted the appropriate contributions on their behalf to Local 183.

(16) On October 1, 1986, Local 27 made an application for certification for a bargaining unit of carpenters and carpenters' apprentices employed by Square One Carpentry Inc. The terminal date for the application was October 20, 1986. M. DiBiase posted the Notice to Employees but did not file with the Board a reply, a list of employees or specimen signatures. M. DiBiase agreed to the certification of Local 27. Local 183 was not given any notice of Local 27's application for certification for Square One Carpentry Inc. By decision dated October 22, 1986, the Board certified Local 27 for a bargaining unit of employees of Square One Carpentry Inc. as described in paragraph 1 herein. During October 1986, and prior to October 20, 1986, L. Baldassarra attended at a Square One Carpentry Inc. job site as part of a general control of job sites and noticed that certain employees were working for the company who were not members of Local 183. L. Baldassarra advised M. DiBiase that all the men should be members of Local 183. Local

183 filed a grievance dated October 20, 1986 alleging a contravention of Local 183's agreement with Square One Carpentry Inc.

(17) J. Morgado and L. Mendes worked as pieceworkers for Square One Carpentry Inc. in the fall of 1986. Both Morgado and Mendes signed membership cards for Local 27 in early October 1986. Prior to signing a Local 27 card, Morgado had a discussion with C. DiBiase at work in which C. DiBiase advised him that his union was Local 27 and Morgado should belong to Local 27. C. DiBiase had been a member of Local 27 since at least January 1984. Prior to signing a Local 27 card, Mendes had a discussion with M. DiBiase in which M. DiBiase told him to sign up for Local 27 without giving him any reason. At the time of these discussions, there was no legal obligation requiring Morgado and Mendes to sign Local 27 membership cards.

4. In accordance with the agreement of the parties, the statement of fact was put before the present panel and the parties were given the opportunity to make submissions. Although given notice of that hearing, no one appeared on behalf of Square One Carpentry or Square One Carpentry Inc. The parties' submissions, which essentially focused on whether or not the first agreement was valid, are as follows.

5. Counsel for Local 183 argued that the Board should grant Local 183 the relief it requested in its section 63 and subsection 1(4) application. Counsel noted that the same business with the same principals continued with the incorporation of Square One Carpentry Inc. Counsel for Local 27 concentrated on the subsection 1(4) application. He noted that the basic elements necessary for subsection 1(4) relief were present and that a single employer declaration would have been appropriate if such an application had been made in 1984. However, counsel argued that the Board should not exercise its discretion in favour of granting subsection 1(4) relief given the passage of time, and because Local 183, who treated the two entities separately, was now improperly attempting "to boost" its bargaining rights.

6. Counsel for Local 27 argued that parties could not enter into a valid voluntary recognition agreement when an employer has only one employee. Counsel submitted that since the Board is precluded from certifying a trade union for a one employee bargaining unit, the Act implicitly recognizes that a trade union should not obtain bargaining rights for a bargaining unit of less than two employees. Counsel referred to the only two Board decisions on point of which he was aware of: *Peter Walter Dow*, [1981] OLRB Rep. June 692 and *J. C. Milne Const. Co. (Canada) Inc.*, [1979] OLRB Rep. Mar. 220. These cases take different approaches to the issue and counsel asked us to adopt the approach in *Peter Walter Dow*, *supra*. In essence, counsel for Local 183 asked us to follow the approach in *J. C. Milne Const. Co. (Canada) Inc.*, *supra*. Counsel noted that the *Peter Walter Dow* decision makes no reference to the earlier decision and that both were decided prior to *Nicholls-Radtke*, [1982] OLRB Rep. July 1028 where the Board found, given the circumstances, that a collective agreement was valid even though it was signed when the employer did not employ anyone falling within the bargaining unit.

7. The remaining submissions concentrated on the issue of whether the first agreement was invalid due to employer support contrary to section 48 of the Act. These submissions focused essentially on the statement by the F.E.D. representative to M. DiBiase that he had to sign with Local 183 or he could not work on any of the Greenpark Homes' sites and the way in which Local 183 obtained the membership evidence on September 26, 1983 prior to signing the first agreement.

8. Counsel for Local 183 submitted that the subcontracting provision in the F.E.D. collective agreement was a valid provision. Counsel for Local 27 conceded, in essence, that the relevant

subcontracting provision was legal in an abstract sense. Counsel for Local 183 then characterized the central issue in this case as one of whether Local 183 could enforce the subcontracting provision since this, he submitted, was all Local 183 did. Counsel argued that the comment of the F.E.D. representative to M. DiBiase does not constitute employer support given the presence of the subcontracting clause and the other circumstances of this case. He noted that F.E.D. was simply attempting to ensure there was compliance with its collective agreement. Counsel suggested there could not be employer support in these circumstances since there was no evidence that Local 183 representatives were aware of what the F.E.D. representative said to M. DiBiase. Counsel also noted that it is clear from the facts that M. DiBiase was not threatened and did not want to sign with Local 183. Counsel submitted that membership cards and a collective agreement were signed not because of anything Local 183 did but because of what the F.E.D. representative said. He argued that faced with certain economic realities, Square One Carpentry made a business decision to sign the agreement and remain working on the site. Counsel submitted that Local 183 took a practical, economical and common sense approach. Rather than have Square One Carpentry kicked off the job site, it gave the employer and employees the right to sign and continue working. In counsel's submission, the existence of the subcontracting provision with F.E.D. gave Local 183 the right to put F.E.D. in compliance with its collective agreement and as long as it pursued this objective, the precise manner in which compliance was achieved is irrelevant. For example, when membership cards were signed in relation to the signing of a collective agreement or how the membership cards were signed are irrelevant.

9. In response to the above comments, counsel for Local 27 argued that the existence of a subcontracting provision did not entitle Local 183 to ignore the provisions of the Act in its quest to put a subcontractor such as Square One Carpentry in compliance. Counsel submitted that such an approach ignores the section 3 rights of employees and the general scheme of the Act which has as one of its bases the principle that employees have the right to freely choose a bargaining agent. He argued that no matter how efficient or practical the approach, the decision as to whether a valid bargaining relationship has been created cannot be based solely on whether an employer made a wise business decision. In arguing that the first agreement was void due to employer support, counsel referred to the circumstances in which Local 183 obtained its membership evidence. Counsel noted that the employee signed a membership card in the presence of the partners who also signed membership cards. He emphasized the responsive nature of the employer-employee relationship and submitted that from the evidence the only inference the Board can draw is that the employee signed because the owners did. It was argued that a voluntary recognition entered into when there are no employees or where the trade union does not represent any of the employees is void for employer support (the *Nicholls-Radtke* exception was noted). Counsel argued that since the membership card of the only employee was obtained with employer support, there was no valid membership evidence. He argued in essence then that this is a case where Local 183 entered into a collective agreement when it did not represent any employees. Counsel submitted that the presence of the subcontracting provision cannot legitimize what occurred here which was the selection of a bargaining agent for its employee by Square One Carpentry. Counsel for Local 183 responded by again emphasizing the importance of the F.E.D. subcontracting provision and argued that the circumstances in which the membership cards were signed should not lead the Board to infer that the employee did not join Local 183 voluntarily.

10. Counsel for Local 27 argued that when examining the significance of the relevant subcontracting provision, one must have regard to the Letter of Understanding between Local 183 and Greenpark Homes (see paragraph (3)), specifically 2(a) and (d) of that document. 2(a) provided for a period of exemption for the operation of the subcontracting provision in the Greenpark Homes' collective agreement while 2(d) recognized that the development of a particular situation would nullify the operation of the subcontracting provision. In counsel's view, these provisions

raised the issue of whether there was in fact an enforceable subcontracting provision at the relevant time. Counsel conceded that the Letter of Understanding was not a part of the F.E.D. collective agreement which contained the subcontracting provision relied on by Local 183. However, he referred to the relationship that existed between F.E.D. and Greenpark Homes and the Letter of Understanding and argued that there was some doubt as to the enforceability of F.E.D.'s subcontracting provision. Counsel noted he was not alleging that F.E.D. and Greenpark Homes constituted a single employer for the purposes of the Act. Counsel for Local 183 countered by arguing that Greenpark Homes and F.E.D. were two separate entities and were each bound by a separate collective agreement with Local 183. He submitted that since the Letter of Understanding was not a part of the F.E.D. collective agreement, its terms were irrelevant to a consideration of the subcontracting provision contained therein.

11. Counsel for Local 27 argued that, even if one ignored the relationship between F.E.D. and Greenpark Homes, 2(b) of the Letter of Understanding constitutes employer support which renders the first agreement void. 2(b) requires the builders to provide Local 183 with a list of existing carpentry subcontracts and the location of the projects within one week of the signing of the Letter of Understanding. It was argued that this provision was intended to assist Local 183 in its organizing efforts since in the construction industry access to the sites is access to the employees. Counsel submitted that since Square One Carpentry worked for F.E.D. throughout 1983, the year that the Greenpark Homes' collective agreement was executed, it was by means of 2(b) that Local 183 was able to locate Square One Carpentry. In support of this argument, counsel relied on *Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509. In response, counsel for Local 183 noted that one must read 2(a) and (b) of the Letter of Understanding together. He submitted that the information the builders were required to provide to Local 183 was necessary in order to determine what entities were entitled to the exemption contained in 2(a). Counsel also argued that there simply was not any evidence to suggest that the builders were assisting Local 183 in its efforts to organize house framing subcontractors.

12. The Board is satisfied that it is appropriate in the circumstances to grant Local 183 a remedy under section 63 and subsection 1(4) of the Act. In early 1984, the business of Square One Carpentry was transferred to Square One Carpentry Inc. The evidence also indicates that these two entities were engaged in the same business under common control and direction. The circumstances warrant the Board's exercising its discretion in favour of granting a subsection 1(4) declaration. This is not a case where Local 183 is attempting to extend its bargaining rights. Accordingly, the Board declares that there has been a sale of a business from Square One Carpentry to Square One Carpentry Inc. and that these two entities constitute a single employer for purposes of the *Labour Relations Act*.

13. As noted earlier, the Board was referred to two cases which address the issue of whether parties can enter into a valid voluntary recognition agreement at a time when there is only one employee that would fall within the scope of the bargaining unit description. In *Peter Walter Dow, supra*, a section 89 complaint, the Board addressed the issue very briefly and commented at paragraph 31 that "we are of the view that the requirement of 'more than one employee' is also mandatory for a voluntary recognition agreement as evidenced by the wording of sections 15(3) and 52". In reaching this conclusion, there is no indication that the panel considered the following paragraphs in *J. C. Milne Const. Co. (Canada) Inc., supra*:

13. The second memorandum is a voluntary recognition agreement covering construction labourers in the employ of the respondent in Board Area 8. On July 14, 1978 the respondent did in fact employ one construction labourer in Board Area 8 and that construction labourer was a member of the intervener. At the hearing, however, the question was raised as to whether a bargaining unit must include at least two employees before a valid voluntary recognition agree-

ment could be entered into. In this regard reference was made to section 6(1) of the Act which stipulates that upon an application for certification any bargaining unit determined by the Board must consist of more than one employee. Section 6(1), however, is referable only to the certification process and makes no reference to voluntary recognition. The Labour Relations Act recognizes the voluntary recognition process as a completely separate method by which trade unions can acquire bargaining rights. Therefore, statutory limitations on the Board's ability to define a bargaining unit on an application for certification cannot be assumed to also restrict the right of an employer and a trade union in drafting the bargaining unit in a voluntary recognition agreement.

14. Section 52 of the Act does contain a requirement that at the time a trade union is voluntarily recognized it must represent "the employees in the bargaining unit". The use of the word "employees" in this requirement does suggest that more than one employee must be in the bargaining unit for which a union is voluntarily recognized. However, such a suggestion ignores the effect of section 27 of *The Interpretation Act* which reads, in part, as follows:

In every Act, unless the contrary intention appears

- (j) words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse.

15. In our view the Labour Relations Act does not express an intention that the word "employees" should not also be interpreted to include a single employee. Indeed, if anything the contrary is true. Because of the fluctuations in employment (particularly in the construction industry) it sometimes happens that there is only one employee in a bargaining unit, even though at the time the union obtained its bargaining rights there were two or more employees. Notwithstanding this fact, the term "employees" is used throughout the Act with respect to provisions which would appear to be applicable to a single employee in an established bargaining unit. An example of this is section 42 of the Act which states that a collective agreement is "binding upon the employer and upon the trade union that is a party to the agreement ... and upon the *employees* in the bargaining unit defined in the agreement" (emphasis added). In light of these considerations we are satisfied that the term "employees" when used in the *Labour Relations Act* should be interpreted to include a single employee. Therefore, we are of the view that the reference in Section 52 of the Act to a union being entitled to represent the employees in a bargaining unit at the time it is voluntarily recognized also has reference to a single employee within such a bargaining unit, and that accordingly, there is no impediment in the Act to having an employer voluntarily recognize a trade union as bargaining agent for a bargaining unit consisting of only one employee.

14. We agree with the conclusion in *J. C. Milne Const. Co. (Canada) Inc.*, *supra*, on this point and adopt the reasons set out in the paragraphs quoted above. We conclude that, having placed a restriction on the numerical size of a bargaining unit for the purposes of a certification application but not in the case of a bargaining unit created through the process of voluntary recognition, the Legislature did not intend to preclude parties from entering into voluntary recognition agreements where the bargaining unit consists of one employee.

15. As a general comment, the Board does not view this case as dealing with the issue of whether Local 183 can enforce the subcontracting provision contained in the F.E.D. collective agreement. The Board has determined that subcontracting provisions can be a legal means by which a trade union preserves its work jurisdiction (see *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022). Enforcement of Local 183's subcontracting provision with F.E.D. would generally involve Local 183 dealing with or instituting proceedings against F.E.D. This is not to suggest, however, that Local 183 cannot attempt to obtain bargaining rights for employees of a particular subcontractor, such as Square One Carpentry, whose presence on a job site may be in contravention of a subcontracting provision. But in attempting to obtain compliance with a subcontracting clause, a trade union may not be able to legitimately use the exis-

tence of such a clause as a defence to conduct which ignores the section 3 rights of employees and contravenes other provisions of the Act.

16. In determining whether a trade union has been the beneficiary of employer support within the meaning of sections 13 and 48 of the Act, the Board has regard to the purpose of those provisions. In *Edwards & Edwards Limited*, 52 CLLC ¶17,027, the Board expressed the following views on what is now section 13 of the Act:

The unfair practice sections of the Act (including section 45 which prohibits the type of employer conduct referred to in section 9) [which latter section in its relevant parts was the predecessor of the present section 10] are, in large part, designed to safeguard the freedom of employees to join and to bargain collectively through the trade union of their own choice which is granted in section 3. That purpose is furthered by the provisions of section 9 which places upon the Board the obligation to satisfy itself that no employer has meddled in the affairs of an applicant for certification. The section is clearly aimed at “company-dominated” trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the matter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned.

In *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806, the Board also commented on the purpose of section 13 at paragraph 27:

The broad purpose of the section, simply stated, is to preserve the integrity of the collective bargaining process by barring the application of any trade union which, because of employer support, does not owe its sole allegiance to those whom it seeks to represent. A trade union which has accepted the support of any employer whose interests may be affected by its representation places itself in a potential conflict of interest and thereby undermines itself as a union “qualified” to act on behalf of those it seeks to represent. Section 12 catches both the “sweetheart” arrangement between the parties directly affected and also the accepted support of any outside employer whose interests may be affected by the collective representation of those whom the union seeks to represent. In both instances the union’s acceptance of employer support activates the Section 12 bar.

17. After an extensive review of the Board’s jurisprudence in this area, the Board in *Cabral Foods Inc.*, [1985] OLRB Rep. Feb. 165 noted at paragraph 35 that “if a trade union’s ability to be certified or to enter into binding collective agreements could be destroyed by unsolicited employer behaviour of which the union was totally unaware, sections 13 and 48 would cease to serve as protections from employer interference in employees’ selection of a bargaining agent and, instead, become potent instruments for effecting just such interference”.

18. Given the purpose of section 48 and the principles referred to above, the Board finds that the statement by the F.E.D. representative to M. DiBiase that he had to sign with Local 183 or he could not work on any of the Greenpark Homes’ sites does not constitute employer support in the circumstances of this case. F.E.D. was bound to a collective agreement with Local 183 which contained a valid subcontracting provision. The statement of the F.E.D. representative was designed to ensure that F.E.D. complied with its contractual obligation and within this legal context we cannot conclude that Local 183 was the beneficiary of employer support. In addition, there was no evidence to suggest that Local 183 put any pressure on F.E.D. or that any of Local 183’s representatives were aware of what the F.E.D. representative said to M. DiBiase. The facts disclose as well that there was not a “sweetheart” arrangement between Square One Carpentry and

Local 183. M. DiBiase was not particularly anxious to sign a collective agreement with Local 183 but did choose to do so when confronted with the practical realities of the situation. When confronted with the choice of leaving the job site or entering into a collective agreement with Local 183 so as to make Square One Carpentry a subcontractor which F.E.D. could legitimately use without contravening its collective agreement, M. DiBiase chose the latter.

19. In concluding that Local 183's collective agreement with F.E.D. contained a valid subcontracting provision, the Board had regard to Local 27's submissions concerning the effect of section 2(a) and (d) of the Letter of Understanding which formed part of Local 183's collective agreement with Greenpark Homes. In the Board's view, it is not appropriate to assess the validity of the relevant subcontracting provision with reference to the terms contained in the Greenpark Homes collective agreement. Since it is not alleged that F.E.D. and Greenpark Homes constitute one employer for the purposes of the Act, they must be treated as separate entities. The relationship which does exist between the two entities does not lead us to conclude that sections 2(a) and (d) of the Letter of Understanding apply to F.E.D. The fact that the F.E.D. representative advised M. DiBiase to sign with Local 183 or, in effect, to get off the job site indicates that F.E.D. was not of the view that section 2(a), the exemption provision in the Letter of Understanding, applied to it.

20. The Board also cannot accept Local 27's submissions relating to section 2(b) of the Letter of Understanding. When one reads section 2(a) and 2(b) together, it is evident that the purpose of 2(b) was not to have the builders provide Local 183 with organizing assistance. In section 2(a), Local 183 gave the builders an exemption for a period of time from the subcontracting provision with respect to carpentry subcontracts existing at the time the agreement was signed. Section 2(b) requires the builders to provide Local 183 with certain information concerning those subcontracts. Clearly, the purpose of the information was to assist Local 183 in ensuring that the builders were complying with section 2(a). The existence of a provision such as 2(b) within the context of an established bargaining relationship (which is quite different from the circumstances in *Tri-Canada Inc.*, *supra*) does not raise, on the facts before us, the mischief which section 48 was designed to avoid. The Board notes that there was nothing before us to suggest that Local 183's presence on the Greenpark Homes job site at Woodbridge on September 26, 1983 was a result of any information supplied by Greenpark Homes.

21. The Board now turns to the issue of whether the way in which Local 183 obtained its membership support on September 26, 1983 constitutes employer support. There is an onus on Local 27 to satisfy the Board on the balance of probabilities that the employee of Square One Carpentry did not become a member of Local 183 voluntarily. The Board is asked to infer this simply from the fact that the employee signed a membership card in the presence of and at the same time as the partners signed membership cards. Although recognizing the sensitive nature of the employer-employee relationship, the Board is not satisfied that the facts warrant the conclusion that the employee signed a membership card with Local 183 because of employer support. There are no facts which indicate that M. DiBiase or Furlong discussed joining the union or directed the employee to join Local 183. It is a common practice in this sector of the construction industry for the principals of small businesses to perform work and hold a membership card in a trade union. When one reviews all of the circumstances, it appears probable that the prime reason the employee signed with Local 183 was because he wished to remain working at that site and realized that this would not be possible unless he joined Local 183, in view of the subcontracting clause. The Board notes that the Square One Carpentry agreement with Local 183 had been in effect for a number of years with no indication from employees that they did not want Local 183 to represent them until the time of Local 27's certification application. Taking all of these circumstances into account, the Board is not satisfied that there has been employer support within the meaning of section 48 of the

Act which nullifies the application for membership signed by Square One Carpentry's employee on September 26, 1983.

22. For the foregoing reasons, the Board finds that Square One Carpentry and subsequently in January 1984, Square One Carpentry Inc., were bound to a two-year collective agreement with Local 183 which expired on April 30, 1985. Having determined that Local 183 obtained bargaining rights for Square One Carpentry Inc., the Board also finds that Local 183 and Square One Carpentry Inc. were parties to a collective agreement for a period commencing in February 1986 until April 30, 1987 and that this collective agreement was a renewal of the previous collective agreement. Given these findings, it is unnecessary for us to deal with the parties' submissions concerning the validity of Local 27's membership evidence filed in support of its certification application.

23. Under these circumstances, it is appropriate to reconsider the decision dated October 22, 1986 certifying Local 27 for a unit of carpenters and carpenters' apprentices employed by Square One Carpentry Inc. Local 27's application was untimely since it was made at a time when the second collective agreement between Square One Carpentry Inc. and Local 183 was in operation and not in an open period. The Board hereby revokes the certificates issued to Local 27 and Square One Carpentry Inc. dated October 22, 1986 and directs Local 27 to return the certificates to the Registrar forthwith. With respect to Board File No. 0616-87-M, the Board advises the Minister that a conciliation officer should not be appointed since Local 27 does not hold bargaining rights for carpenters and carpenters' apprentices employed by Square One Carpentry Inc.

0649-88-M Ontario Public Service Employees Union, Applicant v. Superior Ambulance Services, Respondent

Employee Reference- Practice and Procedure - First application with respect to the disputed individuals since certification in 1982 - Union also raising issue during last set of negotiations - Mischief against which s.1(3)(b) directed has ceased - Board explaining that it would not direct an examination under s.106(2) if the applicant's material asserts facts which if true would not lead to a different characterization as "employee" or "managerial" - Board officer appointed to conduct examination

BEFORE: S. A. Tacon, Vice-Chair, and Board Members D. A. MacDonald and B. L. Armstrong.

DECISION OF THE BOARD; October 14, 1988

1. This is an application under section 106(2) of the *Labour Relations Act* in which the applicant is seeking a determination as to whether six named individuals are "employees" within the meaning of the Act. Those persons are: Lorne Hart, Jim Burden, L. Verhegghe, Paul Hansen, Gordon Walton and Doug Waugh, all classified as supervisors by the respondent.

2. In *The Windsor Star*, [1988] OLRB Rep. Apr. 427 at paragraph 14, the Board outlined the information which thenceforth would be required in section 106(2) applications:

14. Therefore, the Board will no longer restrict the evidence to be adduced before a Board Officer with respect to the duties and responsibilities of the person(s) in dispute to "changes" in those duties and responsibilities, as in the past. Section 106(2) applications commonly are initiated through an often sparse letter to the Board merely naming the individual(s) in dispute.

Henceforth, the applicant must, in addition, indicate the basis for the application, i.e., the nature of the position, including duties and responsibilities (to the extent known, where the applicant is a trade union), the historical dimension to the position (if any) including any Board determinations and parties' agreements and how the mischief against which sections 1(3)(b) or 12 are directed has arisen or has ceased. The respondent must outline fully any grounds it asserts as to why the Board should not entertain evidence as to the duties and responsibilities of the person(s) in dispute. The Board must be satisfied a "question" has arisen as to the "employee" or "guard" status of the individual(s) in dispute before a duties and responsibilities examination will be directed. Where the individual's status has not been previously determined by the Board in a certification application or earlier 106(2) application or by specific agreement of the parties, an examination will generally be directed. Where the Board has previously determined the status of a person in a certification application or prior section 106(2) application or where the parties have reached a specific agreement as to the person's status, the Board will not permit evidence as to the person's duties and responsibilities to be adduced before a Board Officer unless the Board is satisfied, on the face of the application, that it appears the mischief against which section 1(3)(b) or section 12 is directed has arisen or has ceased. Where the Board is not so satisfied, the application may be dismissed without a hearing. In the Board's opinion, this policy does not undermine agreements of the parties as to the person's status and avoids repeated or frivolous examinations, yet provides sufficient flexibility to adequately respond to circumstances where the mischief against which sections 1(3)(b) and 12 are directed has arisen or has ceased.

3. When an application under section 106(2) is received, the Registrar acknowledges the application, directs the applicant's attention to the relevant passages in *The Windsor Star* decision, *supra*, and establishes a deadline for receipt of the required information. The applicant's materials are circulated to the respondent for reply by a specified date and the respondent, as well, is directed to the relevant excerpt from *The Windsor Star*, *supra*. Finally, the respondent's reply, if any, is circulated to the applicant for comments, again, with a deadline established. The Board considers the material filed and, in the context of the principles set out in *The Windsor Star*, *supra* (paragraphs 8 to 15 in particular), either appoints a Board Officer to conduct a duties and responsibilities examination of the person(s) in dispute or declines to do so.

4. The applicant, in its material filed with the Board, outlined its view of the history of the positions and the duties of the incumbents. The respondent opposed an examination of those named persons on the basis that the applicant failed to demonstrate the "mischief" against which section 1(3)(b) is directed. Further, the respondent contended that, in respect of four of the persons (L. Hart, J. Burden, L. Verheghe and P. Hansen), there is a specific agreement or Board determination that both exercise managerial authority dating from the applicant's certification in 1982 when those four (amongst others no longer holding the position of supervisor) were excluded from the bargaining unit.

5. In *The Windsor Star*, *supra*, the Board indicated (in the passage quoted above) that "where the Board has previously determined the status of a person in a certification application or prior section 106(2) application or where the parties have reached a specific agreement as to the person's status, the Board will not permit evidence as to the person's duties and responsibilities to be adduced before a Board Officer unless the Board is satisfied, on the face of the application, that it appears the mischief against which section 1(3)(b) or section 12 is directed has arisen or has ceased". This approach seeks to balance the interest in upholding prior agreements of the parties and avoiding repeated or frivolous examinations against the need for flexibility to adequately respond to circumstances where the mischief noted has arisen or ceased.

6. In the instant case, the Board is satisfied that a "question" exists between the parties as to the "employee" status of the six named persons and that the mischief against which section 1(3)(b) is directed may well have ceased. This application is the first in respect of the disputed individuals (or the previous incumbents) since certification in 1982. Thus, the application cannot be

regarded, on its face, as frivolous or a repeated raising of the issue. Moreover, the applicant asserted that the question of the status of the persons in dispute was raised during the last round of negotiations and that the union reserved the right to seek a section 106(2) determination. The respondent did not dispute that assertion. The decision in *The Windsor Star, supra*, established informational requirements before the Board would decide whether a “question” had, in fact, arisen between the parties and direct an examination of the duties and responsibilities. As well, *The Windsor Star, supra*, rejected the artificiality of focusing on the timing of the application as a vehicle for directing a “full” examination or one restricted to “changes”. That is, where a Board Officer is appointed, a full duties and responsibilities examination is conducted and the question of “changes” moves to an evidentiary matter where the *status quo*, the duties and responsibilities of the disputed individual(s) (including any changes thereto) and the historical context become matters of evidence to be given the appropriate weight in each case. In the Board’s view, in the circumstances, the previous agreement does not operate to preclude forever a section 106(2) application where, as here, the material filed by the applicant, on its face, appears to indicate that the mischief has ceased. Rather, that agreement and the historical context at the time of certification and subsequently are relevant evidentiary matters in addition to the current duties and responsibilities of the persons in dispute.

7. In reaching this conclusion, the Board is not ignoring the material filed by the respondent regarding the duties and responsibilities of the six persons. It is apparent that there is a dispute between the parties as to what the persons in question actually do and whether those functions would result in their characterization as managerial within the meaning of section 1(3)(b) of the Act. That dispute is what section 106(2) is intended to resolve.

8. Further, in considering the material filed, the Board is not accepting the applicant’s submissions in its letter of September 28, 1988 that a Board Officer should be appointed regardless of whether the mischief apparently has arisen or ceased. With respect to other matters noted in that letter, the Board comments that the policy set out in *The Windsor Star, supra*, does not bind the parties indefinitely but, rather, provides a flexible approach which recognizes that positions do evolve over time and directs a section 106(2) examination wherever the applicant’s material indicates, on its face, that the mischief may well have arisen or have ceased. That is, if the facts asserted are proved through the examination, the facts would likely lead to a different characterization of the person(s) in dispute, i.e., from “managerial” to “employee” or vice versa. The Board would not direct an appointment under section 106(2) if the applicant’s material, of itself, asserts facts as to a person’s duties and responsibilities which, if proved true, would not lead to a different characterization as “employee” or “managerial”. Despite the applicant’s comments in its September 28 letter, its earlier letter of July 18, 1988 does outline the history and duties of the persons holding the positions in dispute. Those assertions, if proved true, may well result in the persons no longer being regarded as managerial within the meaning of section 1(3)(b). The respondent disputes the factual assertions, *inter alia*.

9. Thus, having regard to the material filed and the principles enunciated in *The Windsor Star, supra*, the Board is satisfied that a “question” exists between the parties as to the “employee” status of the individuals in dispute. Accordingly, a Board Officer is hereby appointed to inquire into the duties and responsibilities of the six individuals named in paragraph 1 above.

10. This matter is referred to the Registrar in accordance with the foregoing.

0700-88-R Ontario Secondary School Teachers' Federation, Applicant v. The Wentworth County Board of Education, Respondent v. Ontario Public School Teachers Federation, Intervener

Certification - Practice and Procedure - Pre-Hearing Vote - Applicant seeking leave to withdraw its certification application following a pre-hearing vote but before ballots counted - Whether six-month bar should be imposed - Board analyzing Practice Note 7 - Bar imposed

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *J. Trim* and *C. McDonald*.

DECISION OF THE BOARD; October 20, 1988

1. By a decision dated August 2, 1988, the Board directed the taking of a pre-hearing representation vote in this application for certification and further directed that the ballot box be sealed. The vote was taken on September 8, 1988, but, pursuant to the Board's direction, was not counted.
2. In a letter dated September 28, 1988, counsel for the applicant sought leave to withdraw its application or, in the alternative, if it dismisses the application, that the Board not exercise its discretion to impose a six-month bar on the union's making a subsequent application because of "the unusual nature of the bargaining unit and the difficulty to the applicant of ascertaining the number of employees in this unit".
3. In light of Practice Note No. 7, the Board sought the submissions of the other parties with respect to the applicant's request. The intervener notified the Board that it had no submissions to make. The respondent, however, submitted that the applicant was aware of the unusual nature of the proposed bargaining unit when it made the application and for that reason and since a vote had been held, the Board should dismiss the application with the imposition of a six-month bar.
4. Practice Note No. 7 provides at paragraphs 5 and 6 that
 5. Where, on an application for a pre-hearing representation vote, *after* an examiner has been appointed and *has met* with the parties, an applicant requests leave to withdraw its application, the Board in its endorsement has noted the request to withdraw and has dismissed the application. See *Lake Simcoe Ice & Enterprises Limited*, [1963] OLRB Rep. June 159.
 6. Where a request for leave to withdraw is made by an applicant after a vote has been directed, the Board has dismissed the application and in its endorsement has drawn the attention of the parties to the decision of the Board in *Mathias Ouellette*, [1955] 55 CLLC ¶18,026.

It also provides that where the other parties agree to a request to withdraw made at a hearing, "leave to withdraw will be granted".

5. *Lake Simcoe Ice*, *supra*, makes it clear that it is the stage of the process which warrants the dismissal, but there is no explanation in that case of why the stage matters. Once a Labour Relations Officer has met with the parties, it can be presumed that the request for withdrawal has been prompted by the revelation of the applicant's position. Indeed, where that is obviously not the case, the Board may permit the withdrawal (see for example, *Salvador Barraco*, Board File No. 1270-86-R, in which the Board permitted the withdrawal because the respondent had not attended at the Officer's meeting); that will be the rare case, however, given the Practice Note

(even in *Salvador Barraco*, it should be noted, there was no objection by the respondent to the withdrawal).

6. The thrust of *Mathias Ouellette, supra*, is that “a trade union should not be permitted to anticipate defeat in a representation vote and escape the consequences of defeat by seeking to withdraw its application after such a vote has been directed by the Board but before the vote has been taken”. The Board stated in that case that the six-month bar will not be imposed where the vote has been directed *but before the vote is taken*, “but if the applicant union files a new application affecting the same employees within six months from the date when the application is dismissed, the onus will lie on the applicant to show that special circumstances do exist which would warrant the new application being entertained at that time”.

7. These principles will not be applied if there is consent at a hearing to the withdrawal. At this stage of a pre-hearing representation vote, the written submissions of the parties are analogous to a hearing in a non-pre-hearing vote certification application. That is why the Board sought the submissions of the other parties. All the parties are entitled to rely on the Practice Note which has been published to permit the parties to conduct themselves in accordance with certain settled expectations. This does not mean that the Board will not depart from the Practice Note where the circumstances of a case are sufficiently unusual as to warrant a departure. It is on that basis that the applicant in this case sought withdrawal or the non-imposition of the bar.

8. Since the respondent has not consented to the withdrawal, the Board must decide whether it should apply its normal practice. We note that the vote has been taken and therefore the principle set out in *Mathias Ouellette, supra*, does not apply. We are not persuaded that the reason given by the applicant warrants a departure from the Board’s usual practice and we are supported in this position by the fact that the union’s apparent support at the time the application was made was vulnerable and would reach the required thirty-five per cent only if its position on the challenges was correct. More importantly perhaps (because the union could be put in that position simply by another party’s raising challenges to nearly all the employees in the applicant’s proposed unit), its best position was only slightly over the required percentage.

9. Therefore, leave to withdraw is denied and this application is dismissed.

10. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date hereof.

11. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2034-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Runnymede Development Corporation Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1056-87-R: Ontario Nurses' Association (Applicant) v. James Bay General Hospital (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Moosonee, Attawapiskat, and Fort Albany, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week" (23 employees in unit) (*Having regard to the agreement of the parties*)

3417-87-R: United Textile Workers of America (Applicant) v. Ronny Sportswear (Canada) Inc. (Respondent)

Unit: "all employees of the respondent at its plant in the Town of Niagara-on-the-Lake, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (42 employees in unit) (*Having regard to the agreement of the parties*)

0405-88-R: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Wm. Grainger Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0446-88-R: United Food & Commercial Workers International Union, Local 633 (Applicant) v. 729685 Ontario Ltd. c.o.b. as Montgomery I.G.A. (Respondent)

Unit: "all employees of the respondent in the City of London employed in the meat department, save and except the department manager, persons above the rank of department manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (33 employees in unit) (*Having regard to the agreement of the parties*)

0579-88-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. 389188 Ontario Ltd. c.o.b. as Allied Painting Contractors (Respondent) v. Group of Employees (Objectors)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the County of Wellington, save and except non-working foremen and persons above the rank of (73 employees in unit)

0584-88-R: International Association of Machinists & Aerospace Workers (Applicant) v. Paint Plas Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Ajax, save and except supervisors/foremen, persons above the rank of supervisor/foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (144 employees in unit) (*Having regard to the agreement of the parties*)

0706-88-R: Ontario Public Service Employees Union (Applicant) v. District of Parry Sound Welfare Administration Board; The Children’s Aid Society of the District of Parry Sound (Respondents)

Unit #1: “all employees of the respondent in the District of Parry Sound, save and except supervisors, persons above the rank of supervisor, Executive Secretary, Bookkeeper, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (31 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the District of Parry Sound regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, Executive Secretary and Bookkeeper” (13 employees in unit) (*Having regard to the agreement of the parties*)

0737-88-R: Canadian Union of Public Employees (Applicant) v. Carleton Place & District Memorial Hospital (Respondent) v. Association of Allied Health Professionals: Ontario (Intervener #1) v. International Union of Operating Engineers, Local 796 (Intervener #2) v. Group of Employees (Objectors)

Unit #1: (*see Applications for Certification Dismissed Without Vote*)

Unit #2: “all office and clerical employees of the respondent in Carleton Place regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretary to the chief executive officer and employees in bargaining units for whom any trade union held bargaining rights as of June 21, 1988” (7 employees in unit) (*Having regard to the agreement of the parties*)

Unit #3: “all employees of the respondent in Carleton Place, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, office and clerical staff, paramedical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and employees in bargaining units for whom any trade union held bargaining rights as of June 21, 1988” (21 employees in unit) (*Having regard to the agreement of the parties*)

Unit #4: (*see Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

Unit #5: “all paramedical staff of the respondent in Carleton Place, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for whom any trade union held bargaining rights as of June 21, 1988” (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #6: (*see Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

0773-88-R: United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Lanark

County Board of Education (Respondent) v. Lanark County Board of Education Custodians & Maintenance Employees' Association (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0852-88-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Timiskaming Board of Education (Respondent)

Unit: "all office and clerical employees of the respondent in the District of Timiskaming, save and except persons at or above the rank of assistant superintendent and secretaries to the superintendents" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0854-88-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Spandril Development Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0865-88-R: IWA-Canada (Applicant) v. Hearst & District Association for the Mentally Retarded (Respondent)

Unit: "all employees of the respondent, save and except foremen, all those above the rank of foreman, and office staff, employed by the respondent in the Town of Hearst, in the Province of Ontario" (6 employees in unit) (*Having regard to the agreement of the parties*)

0925-88-R: United Steelworkers of America (Applicant) v. Durso Steel Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Brampton, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (14 employees in unit) (*Having regard to the agreement of the parties*)

0935-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Javid Construction Management Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

0974-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Huron Construction Co. Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repair and maintenance of same, in other than the industrial, commercial

and institutional sector of the construction industry, in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman” (28 employees in unit)

0975-88-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Huron Construction Co. Ltd. (Huron Gravel) (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: “all employees of the respondent in the Township of Harwich, save and except foremen, and persons above the rank of foreman, office and clerical staff, and persons employed in the construction industry” (17 employees in unit)

1003-88-R: United Food & Commercial Workers’ International Union, Local 175, AFL:CIO:CLC (Respondent) v. 729685 Ontario Ltd. c.o.b. as Montgomery Loeb I.G.A. (Respondent)

Unit: “all employees of the respondent in the City of London, save and except department managers, persons above the rank of department manager, head cashier, office and clerical staff, and employees for whom bargaining rights were granted under Board File #0446-88-R” (138 employees in unit) (*Having regard to the agreement of the parties*)

1008-88-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Huron Construction Co. Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: “all construction labourers in the employ of the respondent and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repair and maintenance of same in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by subsisting collective agreements between the respondent and the Labourers’ International Union of North America, Local 625 and between the respondent and the International Union of Operating Engineers, Local 793” (17 employees in unit)

1033-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. C. W. West Crane Service Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin and the County of Grey engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1053-88-R: United Steelworkers of America (Applicant) v. Atlas Door Co. Ltd. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (18 employees in unit) (*Having regard to the agreement of the parties*)

1069-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Meadowfield Ventures Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

1075-88-R: Ontario Nurses' Association (Applicant) v. Caressant Care Nursing Home of Canada Ltd. o/a Rest Haven Nursing Home (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in the City of St. Thomas, save and except Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week" (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent in the City of St. Thomas regularly employed for not more than 24 hours per week, save and except Director of Nursing and persons above the rank of Director of Nursing" (3 employees in unit) (*Having regard to the agreement of the parties*)

1079-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Wil-Mat Holdings Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all construction labourers in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1094-88-R: Draftsmen's Association of Ontario International Federation of Professional & Technical Engineers, AFL:CIO:CLC (Applicant) v. McKenzie & Associates General and Marine Consultants Inc. (Respondent)

Unit: "all draftsmen, apprentice draftsmen, and tracer-illustrators employed by the respondent in the Town of Collingwood, save and except supervisors, persons above the rank supervisor and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

1098-88-R: Office & Professional Employees International Union (Applicant) v. Burlington Counselling & Human Relations Institute (Respondent) v. Group of Objecting Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of Halton, save and except coordinators, those persons above the rank of coordinator, office and clerical staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

1116-88-R: Canadian Telephone Employees' Association (Applicant) v. Ontario Telephone Employees' Credit Union Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except assistant treasurer and those above the rank of assistant treasurer, bookkeeper/secretary and students employed during the school vacation period" (13 employees in unit) (*Having regard to the agreement of the parties*)

1117-88-R: United Steelworkers of America (Applicant) v. Midway Lumber Mills Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Thessalon, save and except forepersons, persons above the rank of foreperson, lumber inspectors, the head scaler, office, clerical and sales staff, students employed during the school vacation period" (85 employees in unit) (*Having regard to the agreement of the parties*)

1126-88-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Quality Roofing (Ottawa) Ltd. (Respondent)

Unit: "all roofers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all roofers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1136-88-R: Aluminum, Brick & Glass Workers International Union, AFL:CIO:CLC (Applicant) v. Domglas Inc. (Respondent)

Unit: "all office, clerical and technical employees of the Domglas Inc. in its Bramalea plant office located at 100 West Drive, Bramalea in the Region of Peel, save and except supervisors (including chief locator clerk), persons above the rank of supervisor, quality control complaints analyst, personnel department, purchasing agent, paymaster, secretary to plant accountant, secretaries to those above the rank of department manager, head office staff, nurses, security guards, students hired during the school vacation period or on a co-operative training basis with a school or university, persons at present covered by a subsisting collective agreement with the Aluminum, Brick and Glass Workers International Union and the Canadian Union of Operating Engineers and General Workers" (18 employees in unit) (*Having regard to the agreement of the parties*)

1172-88-R: Service Employees Union, Local 210 affiliated with Service Employees International Union, AFL:CIO:CLC (Applicant) v. 655769 Ontario Inc. o/a Victoria Manor (Respondent)

Unit: "all employees of the respondent at its retirement home at 759 Victoria Avenue in the City of Windsor, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, and office and clerical staff" (20 employees in unit) (*Having regard to the agreement of the parties*)

1178-88-R: Canadian Union of Restaurant & Related Employees, Hotel Employees & Restaurant Employees Union, Local 88 (Applicant) v. Cara Operations Limited (Respondent) v. United Food & Commercial Workers International Union (Intervener)

Unit #1: "all waitresses, waiters, buspersons, kitchen staff, cashiers, and bartenders employed by the respondent at its Swiss Chalet Restaurant located at 1970 Brock Road, Pickering, Ontario, save and except Assistant Dining Room Managers, persons above the rank of Assistant Dining Room Managers, persons employed for 24 hours per week or less and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students employed by the respondent at its Swiss Chalet Restaurant located at 1970 Brock Road, Pickering, Ontario, save and except Assistant Dining Room Managers, persons above the rank of Assistant Dining Room Manager and persons employed for more than 24 hours per week" (42 employees in unit) (*Having regard to the agreement of the parties*)

1183-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pardol Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1192-88-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Barksides Investments Ltd. o/a Lafontaine Terrace (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Kitchener, save and except the Director of Nursing and persons above the rank of Director of Nursing" (2 employees in unit) (*Having regard to the agreement of the parties*)

1193-88-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Barksides Investments Ltd. o/a Lafontaine Terrace (Respondent)

Unit: "all employees of the respondent in Kitchener, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses employed in a nursing capacity, and office and clerical staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

1214-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. M. V. Mark Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1234-88-R: United Plant Guard Workers of America, Amalgamated Plant Guards, Local 1962 (Applicant) v. Burns International Security Services Ltd. (Respondent)

Unit: "all security guards in the employ of the respondent at or out of the City of Peterborough, save and except guard inspectors, persons above the rank of guard inspector, office, clerical and sales staff, those persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (54 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1251-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Condominium Corporation No. 734 (Respondent)

Unit: "all employees of the respondent engaged in cleaning and maintenance in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager, office and clerical staff and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

1254-88-R: United Steelworkers of America (Applicant) v. Brouwer Turf Equipment Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Georgina, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff" (92 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1272-88-R: Teamsters Local No. 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Shop-Vac of Canada Ltd. (Respondent)

Unit: "all employees of the respondent in Burlington, save and except supervisors, persons above the rank of supervisor, office and sales staff, quality control personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (26 employees in unit) (*Having regard to the agreement of the parties*)

1290-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Gemini Plumbing & Mechanical Contracting Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (23 employees in unit)

1319-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rowad Pipeline Company Ltd. (Respondent)

Unit: "all employees of the respondent in the County of Simcoe and the District Municipality of Muskoka,

engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman” (11 employees in unit)

1372-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Braidwood Homes (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1408-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Applicant) v. Decan Machine Erectors Inc. (Respondent)

Unit: “all boilermakers and boilermakers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all boilermakers and boilermakers’ apprentices in the employ of the respondent in all other sectors in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1447-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Boudreau Carpentry (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0093-88-R: Canadian Paperworkers Union (Applicant) v. Boise Cascade Canada Ltd. (Respondent) v. Lumber & Sawmill Workers Union, Local 2693 (Intervener #1) v. International Brotherhood of Electrical Workers, Local 559 (Intervener #2)

Unit: “all employees of the respondent in its Kenora Sawmill Complex and Yard operations including any additional operations in conjunction with the present Mill and Yard operations and other work performed regularly by members of intervener #1 as established by past practice, save and except employees in bargaining units for whom any trade union held bargaining rights as of April 13, 1988” (73 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	68
Number of persons who cast ballots	55
Number of ballots marked in favour of applicant	55
Number of ballots marked in favour of intervener #1	0

0737-88-R: Canadian Union of Public Employees (Applicant) v. Carleton Place & District Memorial Hospital (Respondent) v. Association of Allied Health Professionals: Ontario (Intervener #1) V. International Union of Operating Engineers, Local 796 (Intervener #2) v. Group of Employees (Objectors)

Unit #1: (*see Applications for Certification Dismissed Without Vote*)

Unit #2: (*see Bargaining Agents Certified Without Vote*)

Unit #3: (see *Bargaining Agents Certified Without Vote*)

Unit #4: “all employees of the respondent in Carleton Place regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, office and clerical staff, paramedical staff, and employees in bargaining units for whom any trade union held bargaining rights as of June 21, 1988” (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

Unit #5: (see *Bargaining Agents Certified Without Vote*)

Unit #6: “all paramedical staff of the respondent in Carleton Place regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor and employees in bargaining units for whom any trade union held bargaining rights as of June 21, 1988” (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener #1	3
Number of ballots marked in favour of no union	0

0861-88-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Glascar Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at its Glis Division in Moore Township, save and except plant manager and persons above the rank of plant manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	62
Number of persons who cast ballots	51
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	15

Applications for Certification Dismissed Without Vote

2227-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Jasper Construction Inc., (Respondent) v. Century Store Fixtures Ltd. and Century Interiors Inc. (Intervener) (4 employees in unit)

3216-87-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Brian Barton Building Corp. (Respondent) v. Group of Employees (Objectors) (4 employees in unit)

3203-87-R: Canadian Union of Public Employees (Applicant) v. Saint Vincent Hospital (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener #1) v. The Association of Allied Health Professionals: Ontario (Intervener #2) (589 employees in unit)

0737-88-R: Canadian Union of Public Employees (Applicant) v. Carleton Place & District Memorial Hospital (Respondent) v. Association of Allied Health Professionals: Ontario (Intervener #1) v. International Union of Operating Engineers, Local 796 (Intervener #2) v. Group of Employees (Objectors) Units #2, #3, #5 (see *Bargaining Agents Certified Without Vote*) Units #4 & #6 (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*) (8 employees in unit)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

3148-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bob Martin Construction Co. Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the County of Lennox and Addington, the County of Frontenac and the geographic Townships of Rear Leeds and Landsowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foreman" (27 employees in unit)

Number of names of persons on list as originally prepared by employer	30
Number of persons who cast ballots	26
Number of ballots, excluding segregated ballots cast by persons whose names appear on voters' list	25
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	22
Ballots segregated and not counted	1

0351-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Dibblee Construction Ltd. (Respondent) v. Labourers' International Union of North America, Local 247 (Intervener)

Unit: "all employees of the respondent in the Township of Kingston, save and except non-working foremen, persons above the rank of non-working foreman, office, clerical and engineering staff, and persons for whom any trade union held bargaining rights on May 5, 1987" (11 employees in unit)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	4

0960-88-R: Canadian Union of Public Employees (Applicant) v. Vita Community Living Services of Toronto Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisor, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period" (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	32
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	13

Applications for Certification Withdrawn

3442-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. TESC Contracting Ltd. (Respondent)

0612-88-R: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Refractories Installation Services and Dixon Construction Ltd. (Respondent)

1005-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Towland-Hewitson Construction Ltd. (Respondent)

1127-88-R: Energy & Chemical Workers Union (Applicant) v. Pennwalt Inc. (Respondent)

1146-88-R: International Association of Machinists & Aerospace Workers (Applicant) v. Dominion General Manufacturing Ltd., and D.G.B. Assemblies Ltd. (Respondents)

1171-88-R: Service Employees Union, Local 210 affiliated with Service Employees International Union, AFL-CIO:CLC (Applicant) v. 740195 Ontario Ltd. o/a La Petite Ecole (Respondent)

1182-88-R: Teamsters Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Southern Express Lines of Ontario Ltd., G & W Freightways Ltd. (Respondent)

1191-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Les Ingenieries Consbec Inc. (Respondent)

1239-88-R: Labourers' International Union of North America, Local 506 (Applicant) v. Future Building Materials Ltd. (Respondent)

1247-88-R: Hotel & Restaurant Employees' & Bartenders' Union, Local 604 AFL:CIO:CLC (Applicant) v. Branahasi Restaurant Ltd. (Montreal House) Peterborough, Ontario (Respondent)

1277-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Village Contractors Ltd. (Respondent)

1291-88-R: Ontario Nurses' Association (Applicant) v. The Canadian Red Cross Society (Respondent)

1296-88-R: Labourers' International Union of North America, Local 527 (Applicant) v. East Coast Masonry Ltd. (Respondent)

1404-88-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Canadian Pacific Hotel Corporation c.o.b. as L'Hotel (Respondent)

1432-88-R: Energy & Chemical Worker's Union (Applicant) v. Superior Propane Ltd. (Respondent)

1433-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Crete Flooring Groups Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1190-88-FC: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Hully Gully (London) Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1567-87-R: Millwright District Council of Ontario and Millwright, Local 1425 (Applicant) v. Tesc Contracting Ltd. and Best Construction of Sudbury Ltd. (Respondents) (*Withdrawn*)

3436-87-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Applicant) v. Francon, Division of Canada Cement Lafarge Ltd.; Permanent Concrete (Respondents) (*Withdrawn*)

0019-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Infra Ray Inc. and Lanewood Corp. (Respondent) (*Dismissed*)

0827-88-R: Labourers' International Union of North America, Local 506 (Applicant) v. 672259 Ontario Ltd. c.o.b. as Agrigento Group and Mississauga Construction (Respondents) (*Withdrawn*)

0906-88-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. John John Transportation Services Inc. c.o.b. Can-Am Services and 591182 Ontario Ltd. c.o.b. Wolverine Transport (Respondents) (*Withdrawn*)

0924-88-R: United Steelworkers of America (Applicant) v. Huron Alloys (Division of Leonore Investments) and Ross Steel Fabricators & Contractors (Respondents) (*Withdrawn*)

0975-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Huron Construction Co. Ltd. (Huron Gravel) (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) (*Withdrawn*)

1013-88-R: Labourers International Union of North America, Local 506 (Applicant) v. Future Material Services Inc. and Future Building Materials Ltd. (Respondent) (*Withdrawn*)

1057-88-R: Ontario Public Service Employees Union (Applicant) v. The Children's Aid Society of the District of Parry Sound; District of Parry Sound Welfare Administration Board; District Social Services, Parry Sound District (Respondents) (*Dismissed*)

1090-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sundial Homes Ltd., Meadowfield Ventures Inc. (Respondents) (*Withdrawn*)

1145-88-R: International Association of Machinists & Aerospace Workers (Applicant) v. Dominion General Manufacturing Ltd., D.G.B. Assemblies Ltd. (Respondent) (*Withdrawn*)

SALE OF A BUSINESS

1567-87-R: Millwright District Council of Ontario and Millwright Local 1425 (Applicant) v. Tesc Contracting Ltd. and Best Construction of Sudbury Ltd. (Respondents) (*Withdrawn*)

3028-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Able Welding & Machine Company Ltd.; Acme Welding Works; N.E.R. Rentals Ltd.; Able Crane Rental; Gallardi Hoist & Crane Ltd. (Respondents) (*Withdrawn*)

3437-87-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Applicant) v. Francon, Division of Canada Cement Lafarge Ltd. (Respondent) (*Withdrawn*)

3546-87-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Furama Skyline Restaurant (Respondent) (*Dismissed*)

0020-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Infra Ray Inc. and Lanewood Corp. (Respondent) (*Dismissed*)

0827-88-R: Labourers' International Union of North America, Local 506 (Applicant) v. 672259 Ontario Ltd. c.o.b. as Agrigento Group and Mississauga Construction (Respondents) (*Withdrawn*)

0975-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Huron Construction Co. Ltd. (Huron Gravel) (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

2636-87-R: International Brotherhood of Electrical Workers, Local 594 (Applicant) v. International Brotherhood of Electrical Workers, Local 586, and Ken J. Woods (Respondents) v. J.S.H. Mueller Ltd., Electrical Trade Bargaining Agency and Electrical Contractors Association of Ontario (Intervenors) (*Dismissed*)

0883-88-R: Ontario Public Service Employees Union (Applicant) v. The Dufferin County Board of Education (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3227-87-R: Evaristo Romero (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondent) v. Ideal Railings Ltd. (Intervener)

Unit: “all employees of Ideal Railings Limited working at and out of Metropolitan Toronto, save and except foreman, persons above the rank of foreman, office, sales and clerical employees” (41 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	38
Number of ballots marked in favour of respondent	26
Number of ballots marked against respondent	9
Ballots segregated and not counted	3

0274-88-R: Leo Dumouchel (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Respondent)

Unit: “employees who are ‘qualified and/or certified journeymen or apprentice employed as a plumber, steamfitter, pipefitter, welder and apprentices thereof, or job foreman’ in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario” (3 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

0312-88-R: Franco Pepe (Applicant) v. Ontario Provincial Council and United Brotherhood of Carpenters & Joiners of America, Local 2041 (Respondents) v. Pino Drywall Construction of Ottawa Ltd. (Intervener) (20 employees in unit) (*Dismissed*)

0481-88-R: Mr. Robert R. Voyer (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (6 employees in unit) (*Dismissed*)

0633-88-R: Paula Trahan (Applicant) v. Canadian Union of Public Employees, Local 12.5 (Respondent) v. Chatham Kent Women's Centre Inc. (Intervener)

Unit: “all employees of the intervener in Chatham, Ontario regularly employed for not more than 24 hours per week, save and except the Assistant Administrator, persons above the rank of Assistant Administrator, the Executive Secretary/Bookkeeper, new positions in which a person exercises managerial or confidential functions within the meaning of the Ontario Labour Relations Act” (7 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	5

0680-88-R: Employees of Fairfield Management Ltd. and Creson Investments Ltd. (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Fairfield Management Ltd. (Intervener) (7 employees in unit) (*Dismissed*)

0885-88-R: Nancy Ekdahl (Applicant) v. Canadian Union of Public Employees (Respondent)

Unit: “all employees of Oakville and District Human Society in Oakville, save and except Manager, persons

above the rank of Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (11 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	10

0901-88-R: Labourers' International Union of North America, Local 506 (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondent) v. Anthes Equipment Ltd. (Intervener) (*Withdrawn*)

0907-88-R: Robert Blakely on his own behalf and on behalf of a group of employees (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers of Canada & its C.A.W., Local 252 (Respondent)

Unit: “all regular plant employees at its plant location at 50 Irondale Drive, Weston, Ontario, save and except foremen, persons above the rank of foreman, office staff, plant clerical staff, sales staff, technical staff, (such as work measurement staff, lavatory staff, metallurgical staff, quality control staff), engineering staff (such as professional engineers, engineering technicians, designers, draftsmen), and persons regularly employed for not more than 24 hours per week, and students employed during the school vacation periods” (27 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	24
Number of persons who cast ballots	25
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	24
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	15
Ballots segregated and not counted	1

0948-88-R: Harry McCready, Randy Luffman (Applicants) v. Canadian Textile & Chemical Union (Respondent) v. Brydge Market Corporation (Intervener) (6 employees in unit) (*Granted*)

1006-88-R: David Boodhod (Applicant) v. United Steel Workers of America (Respondent) (*Withdrawn*)

1017-88-R: Shirley Winter (Applicant) v. Independent Canadian Steelworkers' Union (Respondent) v. VS Services Ltd. (Intervener) (19 employees in unit) (*Granted*)

1056-88-R: Rep. of Group - Re (Sunnybrook Hospital Office & Clerical - Full Time) Mrs. Barbara Mullin/Dorothea Fleming (Applicant) v. Sunnybrook Hospital Employees Union, Local 777 Office & Clerical - Full & Part Time (Respondent) v. Sunnybrook Hospital (Intervener) (*Withdrawn*)

1066-88-R: John Parti and bargaining unit employees of Hamilton Automatic Vending Co. Ltd. (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Forgers & Helpers (Respondent) (28 employees in unit) (*Dismissed*)

1165-88-R: Ridsdale Steel Fabricators Inc. (Applicant) v. Sheet Metal Workers' International Association, Local 562 (Respondent) (1 employee in unit) (*Granted*)

1280-88-R: Sheila M. Kunkel (on behalf of the full-time employees of Drug City, Kitchener) (Applicant) v. Retail, Wholesale & Department Store Union, AFL-CIO:CLC and its Local 414 (Respondent) v. Kent Drugs Ltd. (Intervener) (4 employees in unit) (*Granted*)

1281-88-R: Lucy Potwarka (on behalf of the part-time employees of Drug City Pharmacy, Kitchener) (Appli-

cant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC and its Local 414 (Respondent) v. Kent Drugs Ltd. (Intervener) (8 employees in unit) (*Granted*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

0958-88-M: Canadian Pneumatic Control Contractors Association (on behalf of Johnson Controls Ltd. and Landis & Gyr Powers Ltd.) (Employer) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada (Trade Union) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1122-88-U: Ault Foods Ltd. (Applicant) v. The Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Gerald Boivin, Jerry Fabris, Gregory Fournier, Gerald MacDonald, Dan Hack, Robert Hack, and Randy Doner (Respondents) (*Granted*)

1378-88-R: Ontario Nurses' Association (Applicant) v. The Glebe Centre Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1314-88-U: Cornwall Gravel Co. Ltd. (Applicant) v. International Union of Operating Engineers, Local 793, Robert Duval, Graham Garlough, Albert Levac, Ernest Marchand, Daniel McDonald, Lloyd Ouderkirk, Jack McLean (Respondents) (*Withdrawn*)

1407-88-U: Calorific Construction Ltd. (Applicant) v. International Association of Bridge, Structural & Ornamental Ironworkers and the Ironworkers District Council of Ontario ('the Ironworkers'), The Millwright District Council of Ontario ('the Millwrights'), Earl Jamieson, Calvin Hayden, Bill Squire, Joe Boyter, Peter Pryor, and Pat Gorman (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1515-85-U: Bonita Clark and Local 1005, United Steelworkers of America (Complainants) v. Steel Company of Canada Inc. (Respondent) (*Withdrawn*)

1876-85-U: Southern Ontario Newspaper Guild, Local 87 of the Newspaper Guild (Complainant) v. Toronto Star Newspapers Ltd. (Respondent) (*Dismissed*)

1573-86-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. 538391 Ontario Ltd. c.o.b. as Peralta Foods - Ilda C, and Vito Peralta (Respondents) (*Granted*)

3516-86-U: Manzoor Qureshi (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Dismissed*)

1597-87-U: Carr Tech Services Ltd. (Complainant) v. International Association of Machinists & Aerospace Workers, District Lodge 78, Sam Connor, Ed Blair and Gary Bauer (Respondents) (*Withdrawn*)

1730-87-U: International Association of Machinists & Aerospace Workers, Local Lodge 235 (Complainant) v. Carr-Tech Services Ltd. (Respondent) (*Withdrawn*)

1784-87-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC and its Local 414 (Complainant) v. Willett Foods Inc., 674659 Ontario Ltd. and 599872 Ontario Inc. (Respondents) (*Withdrawn*)

3037-87-U: International Association of Machinists & Aerospace Workers, Local Lodge 2288, (Complainant) v. McCleave International Trucks Inc. c.o.b. McCleave Truck Sales Ltd. (Respondent) (*Withdrawn*)

3169-87-U: United Steelworkers of America (Complainant) v. Allan & Marion Discount Mart Ltd. and Allan Zaba Sr. (Respondents) (*Withdrawn*)

3208-87-U: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (Complainant) v. Brabant Newspapers Ltd. (Respondent) (*Withdrawn*)

3315-87-U: Mr. Tony Belcastro (Complainant) v. Union Local 75, Mrs. Marylin Smith (Respondent) (*Withdrawn*)

3384-87-U: International Union of Operating Engineers, Local 793 (Complainant) v. Labourers' International Union of North America, Ontario Provincial District Council, and its affiliated Local Unions L.I.U.N.A., Locals 183, 247, 491, 493, 527, 597, 607, 625, 837, 1036, 1059, 1081, 1089 (Respondents) (*Withdrawn*)

3461-87-U: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Complainant) v. Ambois Insulation Contracting Ltd. (Respondent) (*Withdrawn*)

3497-87-U: International Union of Operating Engineers, Local 793 (Complainant) v. A Council of Trade Unions (Acting as the Representative and Agent of Teamsters, Local 230 and Labourers' International Union of North America, Local Union 183) (Respondents) (*Withdrawn*)

3576-87-U: Hotel Employees & Restaurant Employees Union, Local 604 (Applicant) v. 564002 Ontario Ltd., c.o.b. as Trent Inn Hotel (Respondent) (*Withdrawn*)

0015-88-U: United Steelworkers of America (Applicant) v. The Steel Company of Canada (Respondent) (*Withdrawn*)

0064-88-U: Patricia Xavier (Complainant) v. Office & Professional Employees International Union (OPEIU) (Respondent) v. Ontario Federation of Labour (Intervener) (*Dismissed*)

0146-88-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Canton - East Ferris - Township (Respondent) v. Robert R. Voyer (Intervener) (*Granted*)

0294-88-U: Canadian Union of Public Employees and its Local 161 (Complainant) v. Laurentian Hospital (Respondent) (*Dismissed*)

0338-88-U: Retail, Wholesale & Department Store Union, Local 414 (Complainant) v. Willett Foods Ltd., Loblaw Companies Ltd., & Graham Arnold (Respondents) v. United Food & Commercial Workers International Union, Local 1000A (Intervener) (*Dismissed*)

0362-88-U: Alma College (Complainant) v. Ontario Secondary School Teachers' Federation (Respondent) (*Withdrawn*)

0390-88-U: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Complainant) v. Korban Inc., and Chuck Fink and Rejean Pepin (Respondents) (*Withdrawn*)

0393-88-U: United Food & Commercial Workers International Union, Local 175 and 633 (Complainants) v. Zehrs Markets, A Division of Zehrmart Ltd. (Respondent) (*Withdrawn*)

0395-88-U: United Food & Commercial Workers Local 175, AFL:CIO:CLC (Complainant) v. Humpty Dumpty Foods Ltd. (Respondent) (*Dismissed*)

0440-88-U: Ruth Mitter (Complainant) v. Ontario Nurses Association (Respondent) (*Withdrawn*)

0465-88-U: Hernan Crespo (Complainant) v. S.W.G. Sloan, Director of Plant Operations, University of Waterloo (Respondent) (*Dismissed*)

0562-88-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Rocam Store Fixtures Ltd. (Respondent) (*Withdrawn*)

0592-88-U: Sudbury General Hospital of the Immaculate Heart of Mary (Applicant) v. Ontario Nurses' Association and its Local Union 13, L. Landry, L. Cousineau and others named in Schedule 'B' to the Application (Respondents) (*Withdrawn*)

0630-88-U: Harry Clarke (Complainant) v. Canadian Union of Public Employees, Local 2888 (Respondent) (*Dismissed*)

0656-88-U: International Association of Machinists & Aerospace Workers (Complainant) v. Paint Plas Ltd. (Respondent) (*Withdrawn*)

0661-88-U: United Food & Commercial Workers International Union (Complainant) v. Cara Operations Ltd. c.o.b as Swiss Chalet Restaurant (Respondent) (*Withdrawn*)

0690-88-U: Dean Demizio (Complainant) v. United Food & Commercial Workers International Union, Local 175/633 (Respondent) (*Withdrawn*)

0695-88-U: Ontario Nurses' Association (Applicant) v. Sudbury General Hospital (Respondent) (*Withdrawn*)

0711-88-U: Ontario Secondary School Teachers' Federation (Complainant) v. Alma College (Respondent) (*Withdrawn*)

0743-88-U: International Union of Operating Engineers, Local 793 (Complainant) v. Donegan's Haulage Ltd. (Respondent) (*Withdrawn*)

0775-88-U: United Food & Commercial Workers International Union, Local 459 (Complainant) v. Mirabai Art Glass c.o.b. as Xena Designs (Respondent) (*Withdrawn*)

0776-88-U: Service Employees Union, Local 183 (Complainant) v. Empress Gardens (Respondent) (*Withdrawn*)

0777-88-U: William T. Murray (Complainant) v. Claude Hadley, Canadian Union of Public Employees, Local 1000, The Hydro-Electric Power Commission of Ontario (Respondents) (*Withdrawn*)

0786-88-U: Canadian Union of Public Employees, Local 3224 (Complainant) v. The Broadway Foundation - Chester Village (Respondent) (*Withdrawn*)

0790-88-U, 0889-88-U: United Food & Commercial Workers International Union (Complainant) v. Cara Operations Ltd. c.o.b. as Swiss Chalet Restaurant (Respondent) (*Withdrawn*)

0809-88-U: Nancy McGilvray (Complainant) v. C.U.P.E., Local 1734 and The York Region Board of Education (Respondents) v. Catherine Jane Ludlow (Intervener) (*Withdrawn*)

0837-88-U: Peter Thomas Legace (Complainant) v. Loyal True Blue & Orange Home (Flexible Children's Centre) (Respondent) (*Withdrawn*)

0855-88-U: U.F.C.W. International Union, Local 175 (Complainant) v. Montgomery I.G.A. (Respondent) (*Withdrawn*)

0856-88-U: Energy & Chemical Workers Union (Complainant) v. Drummond Business Form (1984) Ltd. (Respondent) (*Withdrawn*)

0886-88-U: Nin Bearing Mfg Canada (Complainant) v. United Steelworkers of America, Local 8890 (Respondent) (*Withdrawn*)

0891-88-U: Labourers' International Union of North America, Local 506 (Complainant) v. Future Building Materials Ltd. (Respondent) (*Withdrawn*)

0908-88-U: United Steelworkers of America (Complainant) v. 656955 Ontario Ltd., c.o.b. as Pinecrest Nursing Home, and Marcel Parent (Respondent) (*Withdrawn*)

0934-88-U: John Stewart (Complainant) v. John Rodrigues and Value General Contractor Ltd. (Respondents) (*Granted*)

0984-88-U: Newton Fitzgerald (Complainant) v. Bricklayers & Stonemasons Union (Respondent) (*Withdrawn*)

0998-88-U: Hotel Employees, Restaurant Employees Union, Local 75 (Complainant) v. Mr. Greenjeans Restaurant (Respondent) (*Withdrawn*)

1004-88-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Montgomery I.G.A. (Respondent) (*Withdrawn*)

1012-88-U: International Beverage Dispensers' & Bartenders', Local 280 of the Hotel & Restaurant Employees' & Bartenders' International Union (Complainant) v. 774395 Ontario Ltd. c.o.b. Cabarat East (Respondent) (*Withdrawn*)

1014-88-U: Labourers' International Union of North America, Local 506 (Complainant) v. Anthes Equipment Ltd., G.W. Keaney, United Brotherhood of Carpenters & Joiners of America, Local 27 and Jim Smith (Respondents) (*Withdrawn*)

1063-88-U: Tony Abrantes (Complainant) v. United Steelworkers of America, Local 13328 (Respondent) (*Withdrawn*)

1095-88-U: United Food & Commercial Workers Union, Local 1000A, Employees; Tim Buchinski, Dan Mullen, Paul Monteith, Don Harris, Steve Griffiths (Complainants) v. The Officers of United Food & Commercial Workers Local 1000A Region 18 and Loblaws Ltd. (National Grocers, Warehouse Division) (Respondents) (*Withdrawn*)

1135-88-U: Canadian Union of Public Employees (Complainant) v. The YMCA of Metropolitan Toronto (Respondent) (*Withdrawn*)

1147-88-U: Brantford Typographical Union, Local 378 Communications Workers of America (Complainant) v. Brantford Expositor, A Division of Southam Inc. (Respondent) (*Withdrawn*)

1152-88-U: Canadian Textile & Chemical Union (Complainant) v. San-Ted Inc. (Respondent) (*Withdrawn*)

1201-88-U: The Association of Allied Health Professional: Ontario (Complainant) v. The Wellesley Hospital (Respondent) (*Withdrawn*)

1202-88-U: Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Complainant) v. National Press Club (Respondent) (*Withdrawn*)

1215-88-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. Belstone & Goff Electric Ltd. (Respondent) (*Withdrawn*)

1223-88-U: William Egan (Complainant) v. The International Brotherhood of Painters & Allied Trades (Respondent) (*Withdrawn*)

1224-88-U: Robert Bruce Fitzgerald (Complainant) v. John Bechtel & T.C.U. (Respondents) (*Withdrawn*)

1231-88-U: William Ross Avis (Complainant) v. (Paul Tompson) South River Planing Mills (Respondent) (*Withdrawn*)

1236-88-U: Ottawa Typographical Union, Local 102 (Complainant) v. York Advertising Ltd. c.o.b. as York Mailings (Respondent) (*Withdrawn*)

1262-88-U: Bricklayers, Mason, Independent Union of Canada, Local 1 (Complainant) v. Masonry Contractors Association of Toronto Inc., et al (Respondents) (*Withdrawn*)

1271-88-U: Canadian Union of Labour Representative (Complainant) v. Canadian Labour Congress (Respondent) (*Withdrawn*)

1275-88-U: United Steelworkers of America (Complainant) v. Powco Steel Products Ltd. (Respondent) (*Withdrawn*)

1311-88-U: Boise Cascade Canada Ltd. (Complainant) v. International Association of Machinists & Aerospace Workers, Kenora Lodge 490, Richard J. Frenette, Brent F. Taylor, Douglas S. Lundin (Respondents) (*Withdrawn*)

1348-88-U: James Cameron Lyttle (Complainant) v. The Canadian Union of Public Employees - C.L.C., Ontario Hydro Employees' Union, Local 1000 (Respondent) (*Withdrawn*)

1361-88-U: Drummond Business Forms (1984) Ltd. (Complainant) v. The Energy & Chemical Workers Union (Respondent) (*Withdrawn*)

1392-88-U: Labourers' International Union of North America, Local 183 (Complainant) v. Metropolitan Toronto Condominium Corporation No. 734 and/or Del Construction and/or Del Property Management Inc. and/or Tridel Corporation (Respondents) (*Withdrawn*)

1439-88-U: Lorne A. Day (Complainant) v. Triple A Union & Executive (Respondent) (*Dismissed*)

FINANCIAL STATEMENT

0156-88-M: Cecil (Chet) Atkins (Applicant) v. Lumber & Sawmill Workers Union, Local 2693 (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

1940-86-JD: Graphic Communications International Union, Local N-1 (Complainant) v. Southam-Murray (a Division of Southam Printing Ltd.) and Graphic Communications International Union, Local 500-M (Engravers) (Respondents) (*Granted*)

0209-88-JD: The Board of Education for the City of Toronto (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 - and - International Association of Machinists & Aerospace Workers, Local Lodge 235 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2698-83-M: Ontario Nurses' Association Staff Union (Applicant) v. Ontario Nurses' Association (Respondent) (*Dismissed*)

2849-87-M: Almonte Nursing Home (Applicant) v. Health Office & Professional Employees, A Division of Local 179, United Food & Commercial Workers (Respondent) (*Withdrawn*)

2879-87-M: International Beverage Dispensers' & Bartenders' International Union, Local 280 (Applicant) v.

Pajelle Investments Ltd., 410707 Ontario Ltd. (both c.o.b. as Waverley Hotel) and Philip Wynn (Respondent) (*Withdrawn*)

0657-88-M: The Corporation of the City of Barrie (Applicant) v. Canadian Union of Public Employees, Local 2380 (Respondent) (*Withdrawn*)

0666-88-M: Ontario Nurses' Association (Applicant) v. York Finch General Hospital (Respondent) (*Dismissed*)

0728-88-M: Service Employees Union, Local 183 (Applicant) v. Atlas Aluminum Products Ltd., c.o.b. as Edward Street Manor Nursing Home (Respondent) (*Dismissed*)

1054-88-M: Bethesda Home for the Mentally Handicapped Inc. (Applicant) v. The Canadian Union of Public Employees and its Local 2977 (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1476-85-OH: Bonita Clark (Complainant) v. Steel Company of Canada Inc. (Respondent) (*Withdrawn*)

1784-86-OH: Ontario Public Service Employees Union, Local 106 (Complainant) v. Thames Valley Ambulance Ltd., Randy MacDonald, John Hambides, D.G. Zerebecki and Graham Brand (Respondents) (*Withdrawn*)

0103-88-OH: Martin Bracey (Complainant) v. Anil Bhatia (Respondent) (*Dismissed*)

0104-88-OH: Martin Bracey (Complainant) v. Scarborough General Hospital (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

0498-85-M; 1055-85-M; 0881-86-M: United Brotherhood of Carpenters & Joiners of America, Locals 494 & 785 (Applicant) v. Steinberg Inc. (Respondent) (*Granted*)

2058-85-M: Labourers' International Union of North America, Local 607 (Applicant) v. Rino Zanette (1981) Ltd.; Labourers' International Union of North America, Local 607 (Applicant) v. Rino Zanette (1981) Ltd., Sault Holdings Ltd., Zanette Investments Inc. and 444348 Ontario Ltd. (Respondents) (*Dismissed*)

0881-86-M: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Steinberg Inc. (Respondent) (*Granted*)

3202-86-M; 0723-88-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Rock-wall Concrete Forming (London) Ltd. (Respondent) (*Dismissed*)

0343-87-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607 (Applicant) v. Rino Zanette Ltd., Rino Zanette (1981) Ltd., 444348 Ontario Ltd., Zanette Investments Inc., Sault Holdings Ltd. (Respondents) (*Dismissed*)

0978-87-M: Bakery, Confectionery & Tobacco Workers' International Union, Local 483 (Applicant) v. Bluebird Bakery Ltd. (Respondent) (*Granted*)

1113-87-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Withdrawn*)

1568-87-G: Millwright District Council of Ontario and Millwright, Local 1425 (Applicant) v. Tesc Contracting Ltd. and Best Construction of Sudbury Ltd. (Respondents) (*Withdrawn*)

1956-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2222 (Applicant) v. Beaver Lumber Company Ltd. (Respondent) (*Withdrawn*)

2685-87-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. B. U. Duncan Enterprises Inc. (Respondent) (*Withdrawn*)

0018-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Infra Ray Inc. and Lanewood Corp. (Respondent) (*Dismissed*)

0092-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Mass Steel Fabrication Ltd. (Respondent) (*Withdrawn*)

0153-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. The Foundation Company of Canada Ltd. (Respondent) (*Granted*)

0388-88-G; 0389-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Korban Inc. (Respondent) (*Withdrawn*)

0408-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. R.J. Nicol, Construction (1975) Ltd. (Respondent) (*Withdrawn*)

0464-88-G: Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters & Joiners of America on behalf of Local 27 (Applicant) v. Real Carpenters (formerly Neiva Carpentry) (Respondent) (*Granted*)

0486-88-G: Labourers' International Union of North America, Local 1059 and Ontario Allied Construction Trades Council (Applicants) v. Electrical Power Systems Construction Association and Ontario Hydro and Stemmler Wood Products Ltd. and S.G.T. Enterprises Ltd. (Respondents) (*Granted*)

0563-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Newmarch Inc. (Respondent) (*Withdrawn*)

0614-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Torbram Contractors Ltd. (Respondent) (*Withdrawn*)

0930-88-G: United Brotherhood of Carpenters & Joiners of America, Local 1946 (Applicant) v. Blier Inc. (Respondent) (*Withdrawn*)

0978-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Aberdeen Highlands Construction Ltd. (Respondent) (*Withdrawn*)

0979-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Luquan Carpentry (Respondent) (*Withdrawn*)

0992-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Tony Di-Monte Drainage Contractors Ltd. (Respondent) (*Withdrawn*)

1018-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Tesc Contracting (Respondent) (*Withdrawn*)

1120-88-G; 1141-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Rock Construction & Management Ltd. (Respondent) (*Granted*)

1137-88-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. L. G. Barrett Electric Ltd. (Respondent) (*Withdrawn*)

1153-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ron Paolone Group (Respondent) (*Withdrawn*)

1155-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Contact Construction Ltd. (Respondent) (*Withdrawn*)

1156-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Woburn Construction & Store Fixtures Ltd. (Respondent) (*Withdrawn*)

1157-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Anthes Equipment Ltd. (Respondent) (*Withdrawn*)

1158-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. D. S. Campbell Craftsman in Wood Ltd. (Respondent) (*Withdrawn*)

1159-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. McCall Contractors Inc. (Respondent) (*Withdrawn*)

1175-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Curran Contractors Ltd. (Respondent) (*Withdrawn*)

1186-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bennett & Wright Ltd. (Respondent) (*Granted*)

1198-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mauro Carpentry Company (Respondent) (*Withdrawn*)

1199-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Great Gulf Homes (Respondent) (*Withdrawn*)

1204-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Copper Cliff Mechanical Contractors Ltd. (Respondent) (*Withdrawn*)

1218-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Rowad Pipeline Company Ltd. (Respondent) (*Granted*)

1221-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Raf-Tar Construction Ltd. (Respondent) (*Withdrawn*)

1225-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Withdrawn*)

1230-88-G: International Brotherhood of Painters & Allied Trades, District Council 46 (Applicant) v. Spanos Painting Ltd. (Respondent) (*Granted*)

1244-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Luquan Carpentry (Respondent) (*Withdrawn*)

1245-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Westview Carpentry (1988) (Respondent) (*Withdrawn*)

1270-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Shearwall Forming (East) Ltd. (Respondent) (*Granted*)

1298-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Rockwell Concrete Forming Specialists (Respondent) (*Withdrawn*)

1299-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Calvert-Dale Homes (Respondent) (*Withdrawn*)

1300-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Gamen Paving Ltd. (Respondent) (*Withdrawn*)

1301-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Tony Di-Monte Drainage Ltd. (Respondent) (*Withdrawn*)

1305-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. G. M. Gest and The Utility Contractors' Association of Ontario (Respondent) (*Withdrawn*)

1309-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Vex Concrete Inc. (Respondent) (*Withdrawn*)

1315-88-G, 1316-88-G; 1317-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Nu-Style Construction Ltd. (Respondent) (*Granted*)

1323-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Georgian Group (Respondent) (*Withdrawn*)

1373-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Sandercock Construction (1976) Ltd. (Respondent) (*Withdrawn*)

1399-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Crest Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)

1412-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675, United Brotherhood of Carpenters & Joiners of America (Applicant) v. D.M.D. Triangle Lathing (Respondent) (*Withdrawn*)

1416-88-G: International Brotherhood of Electrical Workers, Local 353 of the IBEW Construction Council of Ontario (Applicant) v. Sutherland & Schultz (Respondent) (*Granted*)

1429-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Harris V.S.L. (Respondent) (*Withdrawn*)

1434-88-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. St. Catharines Glass & Mirror (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2081-86-M: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen and Local 4, Ontario (Applicant) v. Plibrico (Canada) Ltd. (Respondent) (*Dismissed*)

0850-87-U: Mansfield Mathias (Complainant) v. Ford Motor Co. (Canada) Ltd. (Respondent) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Intervener) (*Dismissed*)

2052-87-U: International Brotherhood of Electrical Workers, Local 2228 (Complainant) v. Nortec Air Conditioning Industries Ltd. (Respondent) v. Van Hoa Quach on his own behalf and on behalf of a group of employees of Nortec Airconditioning Industries Ltd. (Intervener) (*Dismissed*)

0097-88-R: Dorothy Johnson (Applicant) v. Health Office & Professional Employees, a division of United Food & Commercial Workers International Union, Local 175 (Formerly Local 206) (Respondent) v. Tyndall Nursing Home Ltd. (Intervener) (*Dismissed*)

0622-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Capital Construction Corporation (Respondent) (*Dismissed*)

0684-88-R: United Steelworkers of America (Applicant) v. Quigley Canada Inc. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

November 1988



Ontario

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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EDITOR: COLLEEN EDWARDS

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1392-88-R Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. McDonnell-Ronald Limousine Service Limited operating as - Airline Limousine, Respondent

Certification - Practice and Procedure - Pre-Hearing Vote - Board reviewing purpose of pre-hearing vote and importance of full disclosure of positions of those present at the pre-hearing vote conference with the labour relations officer - Board rejecting respondent employer's proposal that vote be delayed until non-driving brokers in separate related employer application given notice of certification application - Respondent employer objecting at officer's conference to the applicant union's being given copies of the employee and voters lists - Board directing that lists be given to union

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *H. Peacock*.

DECISION OF THE BOARD; November 17, 1988

1. This is an application for certification in which the applicant has requested that a pre-hearing vote be taken.

2. The conduct of pre-hearing representation votes is provided for in section 9 of the *Labour Relations Act* ("the Act"):

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 7(2).

At this stage, we are called upon to deal with the matters referred to in subsections (2) and (3) of section 9. In view of the positions taken by the applicant and respondent, it would be useful to begin with a review of the Board's approach to matters of this sort.

3. The purpose of the pre-hearing vote procedure provided for in section 9 was described in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316:

5. It is axiomatic that in labour relations matters "time is of the essence"; but this is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining

task. The purpose of the pre-hearing, or “quick vote” procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

4. It is critical to an understanding of the Board’s function at this stage to recognize that the Board does not at this point determine any question of substance and there is not, therefore, any need for or right to a “hearing”. As the Board observed in *Ontario Hydro*, [1987] OLRB Rep. Dec. 1589:

3. A quick vote will be a totally illusive ideal except in the most trivially simple of cases if the trade union status of the applicant, the description or composition of the appropriate bargaining unit, the list of persons employed in that unit on the application date, the qualitative and quantitative sufficiency of evidence of membership or any other issue of substance must be adjudicated before the vote is conducted. The provisions of section 9 recognize this. By describing the vote contemplated by section 9 as a “pre-hearing” vote, the Legislature recognized that the Board must be able to decide whether to conduct such a vote without having first to decide any issue in respect of which any person has the right to prior notice and the opportunity of a hearing. As the Board observed in *Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 292 at paragraph 8:

... A “pre-hearing representation vote” is precisely that: a vote conducted before any hearing is held to determine whether and to what extent the result of that vote should affect the rights of the parties. The Board has repeatedly noted that the expedition contemplated and intended by section 9 of the *Labour Relations Act* would be lost if the vote had to await formal adjudication of some contested issue in the guise of a preliminary matter: *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989; *Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602, and the decisions cited therein. A hearing is conducted after the vote to determine whether effect should be given to the result.

4. The Board’s response under subsection 9(2) to a request that a pre-hearing vote be conducted involves a decision about procedure, not substance. The procedural question is whether to gather up additional information about the wishes of employees to be represented by the applicant. The employees whose wishes would be tested in this way collectively constitute one or more voting constituencies, which may very well not be coextensive with the bargaining unit or units ultimately found appropriate by the board. The voting procedure can be designed to ensure that a vote of employees in that bargaining unit or units can, in effect, be retrospectively reconstructed from ballots cast by persons in the voting constituency or constituencies. The Board’s discretion in defining a voting constituency is fettered only by its own assessment of the possible utility of a pre-hearing vote conducted in that constituency. If it appears to the Board that not less than 35 per cent of the employees in a voting constituency were members of the applicant at the time the application was made, the Board may conduct such a vote *before* entertaining the representations and evidence of the parties and other interested persons with respect to matters relevant to the disposition of the application and *before* determining whether and to what extent the results of that vote could or should be relied upon in dealing with the application.

5. Except in very simple cases, there will always be some risk that no use can ultimately be made of the results of a particular pre-hearing representation vote. Against that risk must be balanced the potential benefit of the quick vote, both in the case at hand and for the certification process generally. In the Board’s view, the purpose described in the preamble to the Act is best served by making the section 9 quick vote procedure a real and workable option in the widest possible range of cases. As a matter of policy, the Board will not be quick to conclude that a pre-hearing vote should not be conducted because of a risk, however real, that no use could ultimately be

made of the results. Generally, the Board would rather conduct a pre-hearing vote which might later prove useless than fail to conduct a pre-hearing vote which might have been useful.

5. Reference may also usefully be made to the Board's decision in *Taiga Trucking (Ontario) 1980 Inc.*, [1987] OLRB Rep. Nov. 1433, at paragraphs 5 and 6:

5. Our function at this stage is to make the determinations contemplated by subsection 9(2) of the Act. We do not determine the appropriate bargaining unit or assess the weight to be given to the applicant's membership evidence. As appears from subsection 9(4) of the Act, those matters are only decided after the vote is conducted, when all interested persons will be notified in Form 71 of the contents of the Returning Officer's report and of their opportunity to make representations and have a hearing before the Board with respect to any issue affecting the certification application or the pre-hearing representation vote. Indeed, at this stage the Board does not attempt to resolve any dispute about its constitutional jurisdiction (*Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 293) or the applicant's "trade union status" (*Emery Industries Limited*, *supra*) or the identity of persons employed in any proposed bargaining unit at any relevant time (*The Board of Education for the City of North York*, [1984] OLRB Rep. July 989), or the application of subsection 1(4) of the Act (*Satin Finish Hardwood Flooring (Ontario) Limited*), [1984] OLRB Rep. Nov. 1602). These and any other issues affecting whether and how the results of a pre-hearing vote should affect the disposition of the application for certification are only resolved *after* any such vote is conducted.

6. While we do not resolve such issues at this stage, we do need to know the immediate parties' positions on any issue which could affect the use to which the results of a pre-hearing representation vote may later be put. This is so that a meaningful voting constituency or constituencies can be struck and appropriate directions made concerning segregation of ballots cast by individuals or groups whose inclusion in or exclusion from the appropriate unit or units is in dispute. A pre-hearing vote is of little use unless one can later reconstruct from it a vote of the employees in the unit ultimately found appropriate by the Board. Accordingly, when an applicant requests a pre-hearing vote, the Board's practice is to authorize one of its Labour Relations Officers to examine the records of the applicant and of the respondent and to confer with the parties as to the description and composition of the appropriate bargaining unit, the description and composition of the voting constituency or constituencies, the list of employees as of the terminal date for the purposes of any vote which might be directed and all other matters relating to entitlement to and arrangements for such a vote, and to report to the Board thereon.

As this passage indicates, the Board's determination of the matters contemplated by subsections (2) and (3) of section 9 is not made in a vacuum. In addition to the examination contemplated by subsection 9(2), one (or more) of the Board's Labour Relations Officers ("LROs") confers with the applicant, respondent and any incumbent trade union (as well as any other interested party who seeks to participate) with respect to their positions on issues in the application. While these are not all of the persons who would be affected by the ultimate outcome of the application, it must be recognized that this is not a fact-finding or adjudicative mission but, rather, an attempt to flesh out and pin down the positions of these particular parties with respect to those matters which may or may not later be in issue in the application. Experience teaches that any issues or positions which might later be raised or taken by other interested parties - employees, for example - will almost always fall within the range of issues raised by the applicant, respondent and any incumbent. Accordingly, a pre-hearing vote which is conducted in such a manner as to be potentially useful on any outcome of the range of issues revealed at the conference with the LRO is most likely to remain potentially useful after the vote is conducted and all interested persons are given the opportunity to be heard on the issues referred to in subsection 9(4) and any issues relevant to the disposition of the application.

6. The importance of full disclosure of their positions by those who do participate in the pre-vote conference with the Labour Relations Officer was addressed in *Simpsons Limited*, (Board File No. 1876-84-R, decision dated October 28, 1985, unreported):

14. ... The objective in determining voting constituencies and otherwise making arrangements for a pre-hearing representation vote is to gather information in a form in which it may later be used to determine what the wishes were at the time of the vote of those employees found, in hearings conducted after the vote, to fall within the appropriate bargaining unit or units. It is not necessary for the Board to adjudicate the parties' disputes over the appropriate bargaining unit before striking a voting constituency and otherwise making directions for the conduct of a pre-hearing representation vote. It is necessary for the Board to know the positions of the parties and the nature of the dispute between them with respect to the appropriate bargaining unit, so that a meaningful voting constituency or constituencies can be struck and appropriate directions made concerning segregation of ballots cast by individuals or groups whose inclusion in or exclusion from the appropriate unit or units is in dispute. One of the important objects of a Labour Relations Officer's preliminary meeting with the parties in these cases is to ascertain their position on the appropriate bargaining unit issue and define (and narrow, if possible) the nature of any disagreement on that issue. The pre-hearing vote process would be subverted if a respondent or intervener could advance for the first time at hearing a position or allegation which would, if accepted, render meaningless a pre-hearing vote which could have been conducted in a meaningful way if that position or allegation had been disclosed in an appropriate and timely fashion before the vote was conducted. Accordingly, if a respondent or intervener proposes later to argue that the bargaining unit proposed by the applicant is inappropriate, it must give full particulars of its challenge, and of the description of the unit it considers appropriate, before the Officer's meeting with the parties concludes.

The implication, of course, is that a party who was a participant in the conference with the LRO may not in some circumstances be permitted to advance a position which it did not articulate at the time of that conference. The same point was made in *Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 293, where an employer had suggested to the LRO conducting the conference that a particular date for conduct of a pre-hearing representation vote was inappropriate:

9. As for the matter of the vote arrangements, these will be determined in this case, as in every case in which a pre-hearing vote is requested, on the basis of the material filed prior to the terminal date and officer's meeting with the parties, the submissions made to the officer appointed by the Board to confer with the parties on that and other matters affecting the application, and any subsequent written submissions to the Board which the officer may have invited (as in this case) or directed. The respondent has not provided information on the number of employees who may be unable to vote on February 28th or any other potential vote date. It has not proposed any other time or method of conducting a vote. Instead, it has asked that we schedule a hearing to receive unspecified submissions which it has declined to make either to the officer appointed by the Board or in its letter to the Board. We see no reason to make pre-hearing representation vote arrangements the subject of a pre-vote hearing and thereby delay what is intended to be an expeditious process. *The adequacy of the vote is a matter which can be addressed, after the vote is conducted, on any ground which may fairly be raised at that time, bearing in mind the opportunity the parties have already had to make representations both through the Board's labour Relations Officer and otherwise.*

[emphasis added]

The question whether a party will be permitted at hearing to introduce allegations or issues it did not raise at the pre-vote conference or to resile from positions it took at that conference is a matter for determination by the panel which deals with the merits of the application at the post-vote hearing contemplated by subsection 9(4) of the Act.

7. If there is to be a pre-hearing representation vote in this case, the voting constituency or constituencies must be designed to take into account the positions of the applicant and respondent with respect to the appropriate bargaining unit. The applicant would have the Board describe that unit as:

All dependent contractors of the respondent in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional

Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor.

The respondent takes the position that dependent contractors who are “regularly employed for not more than twenty-four (24) hours per week” (“part-timers”) or “students employed during the school vacation period” (“students”) should not be included in a unit with other dependent contractors but, rather, should constitute a separate appropriate bargaining unit (a “part-time unit”). The respondent also proposes the following clarity note:

CLARITY NOTE: The term “dependent contractors” means drivers, les-see-drivers and broker-drivers.

The applicant agrees to the use of this clarity note.

8. The employer was required to file lists of those persons whom it claims were employed on the application date in the unit proposed by the applicant. Persons regularly employed for not more than 24 hours per week were to be listed on a separate schedule (Schedule “B”) and persons whom in any other respect the employer felt should not be included in the appropriate bargaining unit were to be identified on the list. The lists filed by the employer do not identify any employee as a student. No part-timer has been identified by name on Schedule “B”; the employer has simply written “unknown” on that schedule. When invited at the LRO’s conference to state its position with respect to the part-time unit proposed by the respondent, the applicant chose to say only that a second unit is not appropriate because the employer has not provided the names of any part-timers or students. We observe in passing that the failure to assert the existence of part-timers or students employed *as at the application date* would not, on the Board’s jurisprudence, be entirely dispositive of the question whether division of the dependent contractors into two units would be appropriate. The applicant has chosen not to assert that there were any part-timers or students employed on the application date in the bargaining unit it proposes. If it and the employer are later held to the proposition that there were no such persons on that date and the Board ultimately accepts the respondent’s contention that there are two appropriate units, the applicant could not be certified as bargaining agent of the one unit in which no persons were employed on the application date. Again, we emphasize that the question whether either party will be held accountable for the positions they asserted or failed to assert in the conference with the LRO is a matter which will be entirely in the hands of the panel which deals with this application on its merits after any vote is conducted. The significance of the applicant’s position at this stage is simply that in these circumstances we cannot provide for a separate voting constituency for part-timers and students.

9. We determine that the voting constituency for the purpose of any pre-hearing vote in this application shall consist of:

All dependent contractors of the respondent in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor.

CLARITY NOTE: The term “dependent contractors” means drivers, les-see-drivers and broker-drivers.

In order to take the respondent’s position into account, the ballot of any part-timer or student would be segregated and not counted pending the Board’s determination of the bargaining unit issue on its merits.

10. According to the applicant's records, 108 of its members were employed in the voting constituency on the application date. In the list of employees it filed in this application, the respondent asserted that 339 named persons were employed in that voting constituency on the application date. The names of 101 of those persons correspond with the names of persons who, on the applicant's records, were members of the applicant at the relevant time. This is less than 35 per cent of the number of persons on the employer's list. The applicant challenges the accuracy of the lists filed by the employer, asserting that well over 100 of the persons named on the list were not employed in the voting constituency at the relevant time, while 4 unnamed persons were so employed. If the applicant is correct in this, then not less than thirty-five per cent of the employees in the voting constituency *were* members of the trade union at the time the application was made.

11. The Board's approach in circumstances of this kind was explained in *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989, at paragraph 7:

7. The purpose of the pre-hearing vote procedure is to test the question of representation as quickly as possible after the application date. This avoids the prejudice which inevitably occurs when the conduct of a representation vote must await the determination of factual and legal issues which can only be resolved after a hearing in which each of the affected parties can participate. Often those disputed issues include the appropriate description of the bargaining unit, vote eligibility and employee status of challenged individuals. If the existence of such disputes could stand in the way of a pre-hearing vote, the procedure's efficacy would be destroyed. That is why the Legislature required only that the Board strike a voting constituency and prescribed as the vote prerequisite only that the applicant have the appearance of the requisite support within the voting constituency. (See generally *Emery Industries Limited*, [1980] OLRB Rep. March 316 at paragraphs 5, 6 and 7.) Where determination of the actual prerequisite level of support depends on a resolution of contested factual or legal issues, the Board assesses the appearance of support on the assumption that the union's position on the matters in dispute is correct. A pre-hearing vote is normally directed if, on that assumption, the requisite appearance of support is present. The contested issues are dealt with after the vote is held. However, the results of a pre-hearing vote are of no effect unless it is later demonstrated that not less than 35 per cent of the persons ultimately found to have been employees in the appropriate bargaining unit on the application date were members of the applicant on that date. If that demonstration depends on contested issues being later resolved in the applicant's favour, the Board will normally defer counting any ballots until it can resolve those issues which bear on the propriety of counting all, or any, of the ballots.

In accordance with the principles set out in that passage, it appears to us on an examination of the records of the trade union and the records of the employer that not less than thirty-five per cent of the employees in the voting constituency were members of the trade union at the time that the application was made.

12. The respondent takes the position that the Board should not proceed with this application at this time as "non-driving brokers" have not been given notice of these proceedings. The respondent has filed an application under subsection 1(4) of the Act for a declaration that it and 21 named "non-driving brokers" "carry on associated or related activities or business [sic] under common control or direction and are [sic] one employer for the purposes of the *Labour Relations Act*". The assertion in the application is that those "non-driving brokers" have entered into agreements with persons defined as "dependent contractors" in this application and that they exercise employer-like functions" under those agreements. That application has not yet reached the stage at which any reply has been received from any of the "non-driving brokers" affected. The trade union had not received notice of that application at the time of the conference with the labour relations officer, but took the position that this application should be dealt with by the Board without delay.

13. There is no suggestion by the respondent, and no reason to suppose from any of the

material, that any outcome of the respondent's application under subsection 1(4) would affect the composition of the appropriate bargaining unit or the number or identify of persons employed in that bargaining unit at any time material to the disposition of this application. It is not suggested, and there is no reason for us to suppose, that consideration of the possible outcomes of the subsection 1(4) application would or could affect the composition of the voting constituency or the way in which a vote of those employed in that constituency should be conducted. The only thing the respondent points to is that the "non-driving brokers" affected by the application under subsection 1(4) do not have notice of this application. Those "non-driving brokers" who receive notice of the application under subsection 1(4) will also receive notice of this certification application before any hearing is conducted under subsection 9(4) with respect to the merits of this application. Having not been invited to participate in the conference with the LRO, they will not be prevented from raising any relevant issue or taking any appropriate position merely because the issue or position was not raised at the conference with the LRO. If they raise and succeed on an issue which renders the results of the pre-hearing representation vote unusable, then those results will be unusable. The fact that the "non-driving brokers" do not now have notice of this application will in no way prejudice their position with respect to it. We do not accept that our determination under subsections (2) and (3) of section 9 should be delayed until after the non-driving brokers have been given notice of these proceedings.

14. Accordingly, we direct that a pre-hearing representation vote be conducted among employees in the voting constituency described in paragraph 9 hereof. All those employed in that voting constituency on October 31, 1988 who are so employed on the date the vote is conducted shall be eligible to vote. If a person seeking to cast a ballot is alleged to be a person regularly employed for not more than 24 hours per week or a student employed during the school vacation period, as of either October 31, 1988 or the date on which the vote is conducted, his or her ballot shall be segregated and not counted pending determination by the Board of the matters referred to in subsection 9(4) of the Act. Having regard to the matters discussed in paragraphs 10 and 11 above, the ballot box shall be sealed and none of the ballots cast therein shall be counted pending resolution of the issue referred to therein.

15. The report of the LROs on their conference with representatives of the applicant and respondent indicates that a number of issues arose with respect to the preparation of voters lists and other matters concerning the conduct of any pre-hearing representation vote. Insofar as those issues relate to the conduct of the vote itself, the determination of those matters is referred to the Registrar under section 68 of the Board's Rules of Procedure. Insofar as those issues concern the right of the employer to assert that the persons employed in the voting constituency as of October 31, 1988 were other than as indicated in the document prepared at the conference with the LROs, that is an issue for determination by the panel which hears the application on its merits should there be any remaining dispute in that regard at that time. Insofar as the conduct of the vote is concerned, the voters lists will contain the usual notation that persons not named in them who consider themselves eligible to vote should present themselves to the Returning Officer at the time of the vote. As would be the case in the absence of any Board direction to the contrary, anyone asserting the right to vote will be allowed to mark a ballot, and the ballot of anyone whose eligibility to vote is challenged will be segregated and not counted pending resolution of the dispute over their eligibility.

16. During the LROs' conference, the applicant's representatives naturally were given the opportunity to review the list of employees filed by the employer, so that they could advise the LROs of their position with respect to the list of employees in the appropriate bargaining unit or units as of the application date and the list of employees in the voting constituency as of the terminal date (which is the date as of which, as in this case, initial voter eligibility is ordinarily deter-

mined). In the course of that conference, the applicant asked for a copy of the employee list filed by the employer as well as a copy of the voters list which was compiled in the course of the conference. The respondent objected to the applicant's being given a copy of either list. The LROs then indicated that the request would be addressed by a panel of the Board, and invited the parties to file written submissions setting out the basis of their respective positions within two days of the conference.

17. The question whether a trade union applicant for certification should be given copies of the lists of employees filed by the respondent employer has been addressed in several reported decisions in recent years. One is a decision involving this very respondent: *Airline Limousine*, [1985] OLRB Rep. Jan. 1. The Board there concluded that the trade union ought to be given a copy of the list, bearing in mind not only policy considerations having to do with the expeditious and efficacious disposition of certification applications but also the right of the trade union, as a matter of natural justice, to be informed of the information on which an opposite party is seeking to have the Board determine its rights. The Board's conclusion in that case that a trade union is entitled to the information in such a list *as a matter of law* was approved and adopted by the Nova Scotia Supreme Court in *Nova Scotia Michelin Tire Employees' Local 1699 v. Nova Scotia Labour Relations Board*, 86 CLLC ¶14,009. The Board again addressed the issue in *Metropolitan Separate School Board*, [1986] OLRB Rep. Dec. 1733 in a unanimous decision which identified the legal, policy and administrative considerations which require that applicant trade unions be given the information on the lists and favour the giving of that information in the form of copies at an early stage in the proceedings.

18. The Board is sensitive to the fact that some employers are uncomfortable at the prospect that trade unions will in any circumstances and for any purpose be given copies of the list of employees which they prepare in connection with Board proceedings. Of course, some employers are uncomfortable with the idea that they can in any circumstances be compelled to deal with a trade union as exclusive bargaining agent of their employees under the strictures of the *Labour Relations Act*. Discomfort can only guide the Board's approach to the administration of the Act to the extent it translates into persuasive legal or policy reasons for taking a particular approach to that administration. As regards employer discomfort with the disclosure of employee lists, the Board has on several occasions had the opportunity to consider the legal and policy reasons advanced by certain employers in support of the proposition that, in their circumstances, there should be restrictions placed on the timing and circumstances of disclosure to the applicant trade union of the employee lists which they have filed with the Board. The Board was not persuaded in those cases that the trade union should be denied a copy of what is in essence a pleading of fact concerning an outstanding issue.

19. The Board's current administrative approach to the pre-hearing handling of lists accommodates the possibility that there may be some legal or policy consideration or factual circumstance not argued or dealt with in previous decisions which might warrant limiting a trade union to viewing the list in the presence of a labour relations officer without giving the union a copy of the list "to keep." To accommodate this possibility, the Board's LROs do not give the union copies of the lists "to keep" if the employer objects; instead, the union's request is referred to a panel of the Board, so that the Board can consider the legal, policy and factual grounds on which the employer bases its objection. If the objection cannot be dealt with by a panel immediately, as will be the case when the issue arises at an LRO's conference in a pre-hearing vote application, the union is in the meantime given sight of the lists in the company of a labour relations officer. While this approach affords employers an opportunity to argue that legal or policy considerations or factual circumstances warrant departure in their case from the principles and approach adopted in the decisions to which we have referred, the existence of such considerations or circumstances will not be

assumed: they must be advanced and articulated by the employer who opposes the disclosure. It is not enough simply to say that the request is opposed. Unless a respondent employer articulates some credible legal, policy or factual reason for doing otherwise, the Board will give the applicant trade union copies of the lists.

20. Here, the respondent objected at the LROs' conference to the applicant's being given copies of the lists it filed. It did not offer any reason for its objection at that time. With respect to that and several other issues which arose during the conference, the applicant and respondent were told that any written submissions they wished the Board to consider would have to be filed with the Board within two (business) days after the meeting. Counsel for the respondent has since filed three and one-half single-spaced typewritten pages of representations with respect to various matters. Not one word of those submissions addresses the respondent's objection to the union's being given copies of the lists or the reasons for the objection.

21. The respondent having offered no reason why the union should not be given copies of the lists, we direct that such copies be sent to the union with this decision.

22. The matter is referred to the Registrar.

1621-88-R Canadian Union of Postal Workers, Applicant v. Best Cleaners and Contractors Limited, Respondent

Bargaining Unit - Certification - Intimidation and Coercion - Unfair Labour Practice - Employer awarded contract to clean postal plant - Whether circumstances warrant a departure from the usual practice of certifying on a municipal-wide basis where the employer only has one location - Discussion of the contract or service industry generally - Municipal-wide unit appropriate - Allegations by employer of intimidation dismissed - Certificate issuing

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *J. Rundle* and *K. Davies*.

APPEARANCES: *James Hayes*, *Kim Bernhardt*, *Andre Kolompar* and *Gary Whitehouse* for the applicant; *James D. Henderson* and *Ulf Von Dehn* for the respondent.

DECISION OF THE BOARD; November 21, 1988

1. The Board issued a certificate to the applicant in a decision dated November 14, 1988, indicating that reasons would follow.

2. This is an application for certification brought by the Canadian Union of Postal Workers ("CUPW" or "the union") with respect to certain employees of Best Cleaners and Contractors Limited ("Best Cleaners" or "the employer").

3. Although its counsel was present, no one else had appeared for the respondent by 10:00 a.m. when we began the hearing scheduled for 9:30 a.m.; the owner of Best Cleaners, Ulf Von Dehn, arrived at 10:10 a.m.

4. The parties had agreed to a bargaining unit description which limited the union's bar-

gaining rights to a street location. In response to questioning by the Board, we were advised, however, that Best Cleaners has no other contracts in Metropolitan Toronto (or in Ontario, for that matter). Under those circumstances, the Board's usual practice is to certify on a municipal-wide basis. The applicant then took the position that the Board should follow its usual practice and describe the unit in terms of the municipality; the respondent maintained its position that the geographic scope of the unit should be limited to the specific location.

5. Best Cleaners is a cleaning service which until now has performed work on a contract basis outside the province of Ontario. The contract which has given rise to this application is with the South Central postal plant in Toronto, but it could also contract with other types of institutions or businesses, such as a hospital or airport, for example. In light of the fact that the respondent is in the service or contract industry, the Board directed the attention of the parties to *VS Services Ltd.*, a decision of the Board concerning another contract industry, reported at [1987] OLRB Rep. June 931, and asked for their submissions on the applicability of that case to the facts before us.

6. According to the Agreed Statement of Fact in that case, the respondent in *VS Services Ltd.*, *supra*, was a "diversified service Company, providing food services, managerial expertise, health care services and housekeeping services to a widely divergent group of clientele in various sectors". One segment or "group" of one division of VS Services Ltd. (Versa Food Services), the Industrial Dining group, had a contract to supply cafeteria services to Eaton Yale at a specific street address in Chatham. Subsequent to the date of application, but prior to the hearing, VS Services Ltd. commenced a second contract to supply cafeteria services in Chatham. The Agreed Statement of Fact indicated that the terms and conditions of the employment at the two locations differed. VS Services Ltd. had collective agreements with "a variety of unions", the scope clauses of which were limited to specific locations or clients, "with the exception of the Company's vending operations which have scope clauses on a municipal basis". There was also a contract covering the municipality of Oshawa which was not limited to the vending operation, although in practice VS Services Ltd. only operated a vending operation under the (apparently) single Oshawa contract. There was evidence of the manner in which VS Services Ltd. had actually developed specific plans to respond to the needs of the client. The Board found that "there has developed in the Ontario non-vending food service industry a widespread practice of parties agreeing to bargaining units which are confined to an employer's operations in respect of a particular client" (and, indeed, that "client-specific bargaining units have become the norm in this industry") and that "the Board has accepted such agreements in determining bargaining unit configurations in that industry". VS Services Ltd. itself was party to 41 collective agreements with such a scope clause.

7. On the basis of the pattern of scope clauses in the non-vending food service industry in Ontario, the evidence of the community of interest between employees at the two locations at which VS Services Ltd. had contracts in Chatham, and the evidence of the distinct response to client needs in the contracts entered into by VS Services Ltd. in Ontario (resulting, it is important to note, in different terms and conditions of employment for employees engaged to perform those contracts), the Board in *VS Services Ltd.*, *supra*, certified the applicant union for the employees at Eaton Yale, rather than for the City of Chatham.

8. We considered the parties' submissions with respect to the *VS Services Ltd.* case, along with their more general submissions on the scope of the bargaining unit, and in particular the nature of the evidence which counsel for the respondent said he would adduce in support of a limited scope clause, and ruled orally that we would describe the bargaining unit in terms of the municipality of Metropolitan Toronto. The brief reasons we gave at the hearing for that decision are included in our comments on this issue which follow.

9. We recognize, as we told the parties, that the “contract industry” raises certain distinct issues which affect employers, unions, and employees. For example, employers stress that they must successfully bid on contracts and therefore are dependent on other entities for work; furthermore, those entities may be diverse and the contracts may differ accordingly. Unions, for their part, are concerned that the Act’s sale of a business provisions have not been interpreted to encompass a situation in which a contractor, having contracted with unionized employer “A” does not renew that contract but instead contracts with non-unionized employer “B” (who may employ the same employees as employed by “A”). Employees may choose to join a union but then may find themselves performing the same work at the same location but without the union; or employees at location D may find they are covered by the terms and conditions of employment appropriate for the previously established contract at location C, with C and D being very different workplaces (the parties can, of course, negotiate accommodation of those differences). Another issue which may arise is the identity of the employer (see *York Condominium*, [1977] OLRB Rep. Oct. 645, for example); the contractor may be the actual employer, rather than the entity which performs the service. We emphasize that there was no suggestion that that was the case here. The expansion of the service industry in recent years has given rise to these and other issues before this Board and in other fora.

10. The Board in *VS Services Ltd.*, *supra*, referred to *T.R.S. Food Services Limited*, [1980] OLRB Rep. Apr. 542, in which the applicant had requested a municipal-wide unit and the respondent wanted the unit to refer to its client, General Motors. The Board in *T.R.S.* set out the interests which the geographic scope attempts to balance, including the freedom of employees to choose their bargaining agent and the stability of the bargaining rights acquired by the union. The respondent in the case before us submits that since it is dependent on the contractor for the contract which gives work to the employees for whom the union seeks certification, the rationale of the municipal-wide unit is not applicable: the employer cannot simply move its establishment to a new location to avoid the certification. Against that view, the Board in *T.R.S.* articulated the following concern with respect to a unit limited to the client (rather than a street address, but the comments are equally relevant to that geographic description):

8. ... The permanent relationship of the employees involved in this application is with the respondent, T.R.S. Food Services Limited, and not with the respondent’s client, General Motors. While some clients in the food service industry may develop a relatively permanent relationship with a particular company engaged in the food service business, neither the length of the contract for food service nor its continual renewal may be taken for granted. To tie the continuation of the applicant’s bargaining rights to the client being serviced by the respondent would mean that the bargaining rights would be placed in a position of complete dependence on the continuation of the food service contract which existed between the employer and the particular client being serviced at the time of the application for certification. Given the fluctuations of the market place and the competition for such contracts, the Board concludes, on balance, that where the employer has but one location in the municipality, the geographic scope of the bargaining unit should be defined by reference to the municipality in which the respondent is located. We note that in circumstances where an employer has two or more locations in a municipality, additional considerations relating to the actual community of interest shared between the particular locations may become relevant.

(The Board in *VS Services Ltd.*, *supra*, pointed out that the parties in *T.R.S.* subsequently negotiated an agreement with a client specific scope clause.)

11. We note that certification in the cleaning industry has been limited to a street address in several cases before the Board, but it appears that these have been on the agreement of the parties. For example, in certification applications with respect to cleaners in apartment buildings, the Board has certified for a municipal address, on agreement of the parties (see, for example, *Wickford Holdings Ltd.*, [1982] OLRB Rep. Oct. 1578 and *Marchant Property Development*,

[1981] OLRB Rep. Oct. 1433; in both cases, the only bargaining unit issue before the Board was whether the spouses of superintendents of the apartment buildings were employees and there was no consideration of the geographic scope of the unit which was limited to the address of the building on agreement of the parties). The Board also certified for the street address of a building in *Kaneff Properties Ltd.*, [1981] OLRB Rep. June 730; however, although the parties had agreed on that description, the Board did not grant that unit until it was satisfied on the basis of evidence that it was appropriate (the Board also considered whether the unit should be limited to employees “engaged in cleaning”, as agreed to by the parties, but found that on community of interest principles, a unit limited to cleaners was appropriate). The Board in *Kaneff Properties Ltd.*, *supra*, had evidence of certificates being granted to these same parties at municipal addresses, on the agreement of the parties, and was satisfied they had led to viable bargaining relationships. But the Board also noted that “in the absence of ... agreement, if cleaners and maintenance employees divide their time among several buildings in the municipality, the Board may conclude the cleaning staff based at only one or two of those buildings do not constitute an appropriate bargaining unit” and referred to *Zolty Holdings Limited* (Board File No. 0030-81-R, June 24, 1981) in which the Board found that “all employees of the employer engaged in cleaning and maintenance at the employer’s buildings in Metropolitan Toronto” should be included in an appropriate unit. In *Modern Building Cleaning a Division of Dustbane Enterprises Limited* (Board File No. 2360-80-R, April 14, 1981), referred to in *Kaneff Properties Ltd.*, *supra*, the Board certified the applicant union for a named hospital, on agreement of the parties (but raised a concern about fragmentation resulting from a limitation to employees “engaged in cleaning services”). On the other hand, in *Non Profit Housing Corp. of the City of Toronto*, [1981] OLRB Rep. Aug. 1112, the Board granted a municipal-wide unit on agreement (possibly taking into consideration the specific respondent in that case, although there was no discussion of the geographic scope issue at all, but only of the community of interest between the buildings’ maintenance crews and the resident supervisors).

12. Although there appears to be a pattern of bargaining limited to specific locations developing in the cleaning industry, the Board has not yet developed approaches to either the cleaning industry particularly or to the contract or service industry generally which can be considered unique to that industry or distinct from its approach to the industrial sector generally. A case such as *VS Services Ltd.*, *supra*, does not purport to establish a distinct approach or any general policy with respect to “the service industry”, broadly defined, or even for the more specific non-vending food service industry with which it deals. Counsel for Best Cleaners conceded that a bargaining unit described in terms of one location or one client, where there is only one location, or contract, extant, would constitute an exception to the Board’s usual practice of certifying on a municipal-wide basis where the employer is established at only one location. Since where the circumstances warrant, the Board will depart from that practice, as it did in *VS Services Ltd.*, *supra* (where, in any case, VS Services had two contracts at different locations in Chatham), the question before us is whether the circumstances in this case, warrant a departure.

13. We asked counsel for the respondent what evidence he would adduce to justify our departing from the Board’s usual practice. He advised he would call contractors from out-of-province with which the respondent has cleaning contracts, as well as have Mr. Von Dehn testify about the way in which he would have to tailor bids to obtain other contracts in Ontario; he would further adduce evidence of the practice in the industry. We are of the view that evidence of what has occurred between the respondent and contractors outside Ontario and evidence of hypothetical contracts the respondent might negotiate in Ontario would not assist us in determining the issue before us. As for the practice in the industry, we are already aware that there has been some practice of bargaining units limited to a location or client. That might well be of assistance in satisfying us we should depart from the usual practice where there is agreement of the parties, but not where there is disagreement between them, as here. This does not mean that a cleaning subcontractor

could not satisfy the Board that it would be appropriate to certify for a single location or client where it has only one location in the particular city, should it bring appropriate evidence of, for example, actual diverse contracts elsewhere in Ontario, or a history of bargaining with the applicant union, or other evidence similar to that adduced in *VS Services Ltd.*, *supra*, or in *Kaneff Properties Ltd.*, *supra*; it does mean, however, that in this case we are not persuaded we should depart from the Board's usual practice and therefore we ruled orally and stated in our November 14th decision that

all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor,

constitute a unit of employees of the respondent appropriate for collective bargaining.

14. As we further indicated in our decision of November 14th, the applicant had filed sufficient membership evidence that the Board would normally issue a certificate to the applicant under subsection 7(2) of the Act, without further ascertaining the employees' wishes through a representation vote. In this case, however, Best Cleaners alleged that the union had contravened section 70 of the Act by misrepresenting to the employees that they would not have jobs when Best Cleaners began the contract to clean the postal plant. These employees had previously cleaned the postal plant's premises as employees of a different subcontractor. Canada Post then awarded the cleaning contract to the respondent, resulting in a well-publicized conflict between the union and Canada Post over the latter's tendering policy and practice. Some of this conflict was reflected in material placed by the union in the *Toronto Star* and on newspaper reports of a "demonstration" at the postal plant. In fact, it is common ground that the respondent offered the employees jobs, although whether on September 27 or on September 28, 1988, is not clear; in any case, they appear to have begun work on October 1, 1988.

15. The employer alleged that the union intimidated and coerced employees "by conducting a demonstration" on September 29, 1988 at 3:30 p.m. on the property of the postal plant, the events of which are purportedly described in a *Toronto Star* article of September 30, 1988, "indicating that Mr. J.C. Parrott, Mr. Bob Rae, Mr. A. Kolompar and Carol Henry did participate in the demonstration" ("J.C. Parrott" is the national President of C.U.P.W.; "Bob Rae" is the leader of the Ontario New Democrats; "A. Kolompar" is the president of the Toronto local of C.U.P.W.; and "Carol Henry" is a cleaner at the postal plant). Best Cleaner further alleged that membership evidence was obtained through misrepresentation when "the C.U.P.W., A. Kolompar, Carol Henry and J.C. Parrott did, through advertisements in the *Toronto Star* (September 28, 1988) and the *Globe & Mail* (September 29, 1988), a bulletin and the demonstration on September 29, 1988, misrepresent to the employees that they had no job security and would be thrown out of work". (The "bulletin" is a notice of meeting called by the union.) The employer stated that "the majority of the membership cards were signed on September 30, 1988 prior to the employees commencing work with Best Cleaners and Contractors. Further, Mr. A. Kolompar used his position as the president of the local of the individuals to call meetings at 1:00 and 4:00 p.m. on September 30, 1988. These meetings were used to sign membership cards". (In fact, the cards were signed on October 1, 1988, or subsequently, after the employees had been offered jobs by Best Cleaners and on the day at least some of them began work.) Best Cleaners also named certain employees, alleging that their English language skills "are so poor that they were unable to distinguish between already being a member of CUPW and the option of having to become a new member". This last allegation or particular was withdrawn by counsel for the employer at the outset of the hearing and therefore was not considered further by the Board.

16. Counsel for the union contended that the allegations filed by the respondent in its reply and more fully particularized in a subsequent letter dated October 24, 1988, were untimely and did not establish a *prima facie* case. For the purpose of dealing with counsel's objections, we examined all the material (except one item referred to below) upon which counsel for the respondent intended to rely. We assumed that all this material would be admissible without so deciding. In that regard, we simply note the hearsay nature of much of the material filed by the respondent.

17. We examined the advertisement placed by the union in the *Toronto Star* on September 28 (and on September 29), 1988 (we were not given a copy of the advertisement alleged to have been placed in the *Globe & Mail*); the article appearing in the *Toronto Star* on September 30, 1988, entitled "Postal cleaners fear for jobs as non-union contractor hired"; the notice of meeting to be held by the union on September 30, 1988; and a *Globe & Mail* article dated October 1, 1988 entitled "Firm agrees to hire 25 post office cleaners". Counsel for the respondent also wished us to view a tape of a television newscast about the "demonstration" that had occurred at the postal plant. We ruled that the tape would be inadmissible as being only a portion of the event; however, we did examine a transcript alleged to be comments made by Bob Rae at the "demonstration".

18. After recessing to consider the material filed by the respondent, we reconvened and issued the following oral ruling:

We note that counsel for the respondent agreed that he had filed all particulars available to the respondent and, further, that the particulars do not allege that there has been any actual intimidation of any particular employees. There is only a general allegation that employees were intimidated and confused.

We are of the view that none of the material filed on its face establishes a *prima facie* case of intimidation.

At most this material reflects the union's position that the tendering process engaged in by Canada Post may result in problems of job security and that the union can help the employees with that problem. We are not satisfied that this would constitute a misrepresentation within the meaning of section 70 of the Act, that is, that it would constitute intimidation or coercion to compel any of these persons to join the union if the persons stated to have made certain statements as reported in the newspaper reports or at the "demonstration" said them. Nor does the *Toronto Star* advertisement constitute such intimidation, even taking into consideration that shortly before or at the same time as its publication, the employees had been offered jobs on terms of which we were not given evidence.

In light of our dismissal of the respondent's allegations for these reasons, we do not need to decide whether they were filed in an untimely manner and we do not do so.

19. As a result of the above rulings and reasons therefor, the Board issued a certificate to the applicant in its November 14, 1988 decision.

0586-88-R International Brotherhood of Painters and Allied Trades, Applicant v. Dant Industries Limited, Dunwoody Limited, Warratt Holdings Inc., and One-Vinyl Window Mfrs. Ltd., Respondents

Sale of a Business - Vinyl window business going into receivership and then bankrupt - Consultant to predecessor company setting up company to produce vinyl windows - Successor purchasing assets, work in progress and some inventory from receiver - Nearly entire workforce of bankrupt company hired - Sale of a business found - Right to produce vinyl windows designed by consultant acquired directly from consultant not constituting substantial change in the character of the business

BEFORE: Robert D. Howe, Vice-Chair, and Board Members R. W. Pirrie and C. McDonald.

APPEARANCES: Murray Gold, Andrea Wickham and Tony Neil for the applicant; Walter Thornton, David Borwick and Paul Karl Heusser for the respondent One-Vinyl Window Mfrs. Ltd.; L. Frank Molnar and Apolonia D'Sa for the respondent Dunwoody Limited.

DECISION OF THE BOARD; November 25, 1988

1. This is an application under section 63 of the *Labour Relations Act* in which the applicant (also referred to in this decision as the "Union") contends that the respondent One-Vinyl Window Mfrs. Ltd. ("One-Vinyl") is the successor of Dant Industries Limited ("Dant"). The applicant initially indicated that, in the alternative, it was seeking declaratory relief under section 1(4) of the Act. However, during the course of final argument on October 28, 1988, counsel for the applicant indicated that his client was no longer relying on section 1(4). Accordingly, the application is hereby dismissed in so far as it pertains to section 1(4).

2. On October 28, 1988, the Board made the following unanimous oral ruling dismissing the application in relation to Dunwoody Limited (also referred to in this decision as "Dunwoody"):

At the request of the respondent Dunwoody Limited and with the consent of the applicant, this application under sections 1(4) and 63 of the *Labour Relations Act* is hereby dismissed in so far as it pertains to the respondent Dunwoody Limited. We are not, however, prepared to award costs to Dunwoody Limited. It is doubtful that we have jurisdiction to do so in this context. Moreover, the Board has a well established policy of declining to award costs, and we are not persuaded that we should depart from that policy in the circumstances of this case: see, generally, *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Luciano D'Alessandro*, [1987] OLRB Rep. July 986; and the cases cited therein. *Academy of Medicine*, [1977] OLRB Rep. Dec. 783, the case on which Dunwoody Limited relies in support of its request for costs, is clearly distinguishable from the instant case and, in any event, does not reflect the approach which has been followed by the Board since the *Radio Shack* decision.

3. The hearing of this matter commenced on August 29, 1988, and continued on October 20 and 28, 1988. During those three days of hearing, the Board heard oral evidence given by Paul Heusser, the President of One-Vinyl, and Ewe Manski, a Chartered Accountant who is a Vice-President of Dunwoody. In addition to the testimony of those two witnesses, we have before us

extensive documentary evidence which was entered during the course of these proceedings. In making the findings of fact set forth in this decision, we have carefully considered all of that oral and documentary evidence.

4. Mr. Heusser is the principal of Windoor Replacement Limited ("Windoor"), which is in the business of replacing windows in old houses and performing other minor retrofit work. Mr. Heusser also serves as a consultant. He provided extensive consulting services to Dant in respect of its vinyl window business. Dant was owned by an individual named Larry Reisman. It operated out of 3135 and 3165 Unity Drive in Mississauga. Dant imported extruded plastic strips from Europe. To produce vinyl windows, Dant's employees cut those strips to the appropriate lengths and fused them together to form a frame for the glass. Weatherstripping and hardware (for opening, closing, and locking the windows) were also added during the production process. Although its primary business was vinyl windows, Dant also produced doors and door frames. Dant's major customer was Great Gulf Homes, which is owned by other members of the Reisman family. Mr. Heusser was retained as a consultant (through Windoor) prior to the formation of Dant. He helped Dant's principal to set up a plant and to obtain the proper machinery for it. He was also involved in selecting the materials to be used in production. He trained some of Dant's employees, including supervisors, office staff, and sales people. In carrying out his functions as a consultant, Mr. Heusser had contact with a number of Dant's customers, including Great Gulf Homes. Since the vinyl window frame components that Dant was importing from Europe proved to be unsuitable for the Canadian market, Mr. Heusser redesigned them for Dant. He also travelled to Europe to assist Dant's supplier in attempting to modify the frame components for the Canadian market and alleviate the problem of delayed shipments. (He was paid by the European company and its Canadian subsidiary for some of that work.) Dant gave Mr. Heusser the title of "Vice-President" for the purposes of dealing with Dant's employees and European contacts.

5. Dant experienced financial losses throughout its period of operation. In 1987 it lost approximately \$900,000. Those financial difficulties culminated in Dant being put into receivership on February 15, 1988, with Dunwoody becoming Receiver and Manager pursuant to a security instrument held by The Royal Bank of Canada (the "Bank").

6. During the eight month period which preceded the receivership, Mr. Heusser spent approximately thirty-five hours per week providing consulting services to Dant. In addition to providing expert advice with respect to design and technical matters, he also became involved in labour relations matters on behalf of Dant; he disciplined employees, and assisted Dant in dealing with the application for certification that was filed by the Union in the fall of 1987. That application resulted in a certificate being issued by the Board (differently constituted) on November 24, 1987, for the following bargaining unit:

all employees of [Dant Industries Limited] in the City of Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

Mr. Heusser was also involved in negotiations between Dant and the Union following certification.

7. The Bank petitioned Dant into bankruptcy on February 23, 1988, and a receiving order was made on March 3, 1988. During the period preceding the receivership, Dant had fifty-nine employees. In order to keep the business in operation so as to maximize its selling price, Dunwoody rehired thirty-five of them on a day to day basis, and paid them their regular hourly rate, plus the arrears of wages and vacation pay owed to them by Dant. Dunwoody also wished to rehire other Dant employees, but some of them were not interested in returning to work at Dant as a

result of the manner in which they had been treated by Mr. Reisman, and as a result of other employment opportunities available to them. Dunwoody used the rehired employees to repair deficiencies and to complete some of the work which customers had ordered from Dant prior to the receivership. Dunwoody also entered into a major new contract with Great Gulf Homes, under which it agreed to produce \$150,000 worth of vinyl windows for that customer.

8. For three or four years prior to Dant's receivership, Mr. Heusser had been in the process of designing his own vinyl windows. His windows differed in exterior width from Dant's windows, used different hardware (for opening, closing, and locking), and featured weatherstripping that was extruded with the frame, instead of being inserted later in the production process. Mr. Heusser's design also called for a harder vinyl to be used as framing, and for the glass to be installed right into the frame, without a sash. Prior to the receivership, Mr. Heusser had been negotiating with Dant with a view to having Dant manufacture his new windows. However, those negotiations ended without success, due to the receivership.

9. Mr. Heusser knew that Dant's facilities could be used to manufacture the vinyl windows which he had designed. However, he did not have the financial resources necessary to purchase them on his own. Consequently, he approached the principals of United Windows (an established manufacturer of wooden framed windows) to seek financial backing. United Windows then contacted Mr. Manski at Dunwoody. Subsequent discussions resulted in the arrangements described below. Warratt Holdings Inc. ("Warratt") was incorporated in February of 1988 by United Window's corporate lawyer. Warratt's name was subsequently changed to One-Vinyl Window Mfrs. Ltd. A shareholders' agreement provided for thirty of One-Vinyl's one hundred shares to be owned by Mr. Heusser, with fifty of them being owned by Mapledene Investments Inc. (a corporation owned by members of the DeBiasio family, who also own United Windows), and the remaining twenty shares being owned by Otterpond Holdings Inc. (a company owned by three persons employed by United Windows in finance and sales). It also provided for Mr. Heusser to be the initial President and Secretary of One-Vinyl. To purchase his thirty shares in One-Vinyl, Mr. Heusser made a financial investment in the company and also granted it the right to produce the vinyl windows which he had designed.

10. On March 11, 1988, One-Vinyl (under the name of Warratt) entered into an agreement with Dunwoody for the purchase of most of Dant's assets, including its goodwill and virtually all of its machinery, equipment, furniture, and work in progress, as well as some of its inventory and supplies. A nominal value of \$1.00 was assigned to Dant's goodwill. Mr. Manski testified that this is quite standard. He also observed that "[t]here's not much goodwill in a company that just went bankrupt with a million dollar loss." The transaction between Dunwoody and One-Vinyl was completed on March 30, 1988. Dunwoody terminated all of the employees prior to that time.

11. One-Vinyl arranged to lease (from The Erin Mills Development Corporation) the premises which had previously been occupied by Dant at 3165 Unity Drive ("3165"). Entering into such a lease was a condition precedent specified in the asset purchase agreement. 3135 Unity Drive ("3135") was not leased by One-Vinyl as it did not need that space. The equipment from 3135 was moved to 3165. The equipment which Dant had used at 3165 was also rearranged by One-Vinyl. This required some changes in the electrical, plumbing, and air handling systems. Some equipment modifications were also necessary to accommodate the new frames designed by Mr. Heusser. A mezzanine was added to the premises, and the offices were partitioned. One-Vinyl also arranged to use the same telephone number as had been used by Dant.

12. During its first few weeks of operation, One-Vinyl completed some of the work in progress and delivered it to former customers of Dant. It also performed deficiency work for a number

of Dant's former customers, thereby facilitating the collection of some of Dant's accounts receivable, for which One-Vinyl received a commission of ten per cent from Dunwoody. After the vinyl windows designed by Mr. Heusser had been approved for use in construction, One-Vinyl solicited orders from a number of companies, including former customers of Dant. In its first four months of operation, One-Vinyl had sales of approximately \$900,000, of which \$600,000 came from former customers of Dant. Of the approximately \$625,000 worth of work on order or completed as of August of 1988, over \$375,000 came from former customers of Dant, with Great Gulf Homes remaining the major customer (accounting for about \$260,000 of the \$625,000).

13. One-Vinyl hired many persons who had been employed by Dant, including two of Dant's foremen (who were given additional responsibilities by One-Vinyl), Dant's plant manager (who, along with another of Dant's former foremen, joined One-Vinyl's sales staff), Dant's shipper (who continued to work as a shipper but was also given some quality control responsibilities), and many other bargaining unit employees. One-Vinyl also hired some of the office employees formerly employed by Dant, and Dant's stockroom worker (who became One-Vinyl's accounts receivable/accounts payable clerk). Sixteen of the nineteen persons who worked for One-Vinyl during its first payroll period (i.e., the period ending April 8, 1988) were former employees of Dant. As of July 28, 1988, twenty-two of One-Vinyl's forty employees were former employees of Dant. The employee turnover rate continued to be quite high, as it was while Dant was in operation.

14. Although the manufacturing process has been modified somewhat to reflect Mr. Heusser's new design, much of the work involved in producing the windows has not changed materially. Strips of extruded plastic are still cut to the appropriate length and fused to form a frame for the glass. Hardware (for opening, closing, and locking the window) is still added during the production process. Weatherstripping, on the other hand, is no longer added as it is now extruded with the frame. One-Vinyl also produces doors and door frames. The only difference between Dant's and One-Vinyl's operations in that regard is that Dant used subassembled components to produce them, whereas One-Vinyl makes its own components.

15. It is the applicant's position that there has been a sale of a business, within the meaning of section 63 of the Act, from Dant to One-Vinyl (through Dunwoody), as a result of which the applicant was entitled to give One-Vinyl written notice of its desire to bargain with a view to making a collective agreement. Counsel for One-Vinyl, on the other hand, contends that his client merely purchased some of the assets of a bankrupt company, and did not acquire a functional economic vehicle. Thus, he asked the Board to dismiss this application on the basis that there has not been a sale of a business.

16. *Metropolitan Parking*, [1979] OLRB Rep. Dec. 1193, contains a detailed exposition of the history, purposes, and application of section 63 (then section 55). In that decision, the Board wrote, in part, as follows:

29. A more difficult question is whether it is the predecessor's "business" which has been transferred and continued by the successor or, alternatively, there has merely been a transfer of assets or other incidental elements of the business. Unlike *The Successor Rights (Crown Transfers) Act*, *The Labour Relations Act* does not contain a statutory definition of "business", and it is the Board, therefore, which must develop an appropriate meaning. In *Raymond Cote*, [1968] OLRB Rep. Mar. 1211 the Board commented:

"The meaning to be attached to the word 'business' depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is 'the totality of the undertaking.' The physical assets of buildings,

tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business."

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30. A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a "going concern", something which is "carried on." A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets....

31. In determining whether a "business" has been transferred, the Board has frequently found it useful to consider whether the various elements of the predecessor's business can be traced into the hands of the alleged successor; that is, whether there has been an apparent continuation of the business - albeit with a change in the nominal owner. The Board in *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed) commented:

"In each case the decisive question is whether or not there is a continuation of the business ... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business."

32. Of particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section 55 is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section 55....

See also *Krush*, [1987] OLRB Rep. June 859; *Shiffer-Hillman Clothes*, [1983] OLRB Rep. May 764; *Grand Valley Ready Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663; *Sisman's of Canada Limited*, [1980] OLRB Rep. July 1059; *British American Bank Note Company Limited*, [1979] OLRB Rep. Feb. 72; *Dufferin Steel Company, Awico Division*, [1976] OLRB Rep. March 81; and *Aircraft Metal Specialists Limited*, [1970] OLRB Rep. Sept. 702.

17. The interposition of a third party such as a receiver acting as an agent or conduit does not preclude the Board from finding that a sale of a business has occurred: see *Metropolitan Parking Inc.*, *supra*, at paragraph 28; *Big Bear Storage*, [1979] OLRB Rep. March 164; and *Hughes Boat Works Incorporated*, [1977] OLRB Rep. Dec. 815; application for judicial review dismissed (1979), 26 O.R. (2d) 420 (Div. Ct.). However, as indicated by the Board in *Metropolitan Parking*

Inc., at paragraph 34, previous cases are of limited value in resolving the issue of whether or not a sale of a business has occurred, since it is essentially a question of fact:

...the problem is, and always has been, to draw the line between a transfer of a "business" or a "part of a business" and the transfer of "incidental" assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided.

18. Having regard to all of the evidence and the able submissions of counsel, we have concluded that there has been a sale of a business from Dant to One-Vinyl through Dunwoody. As noted above, One-Vinyl purchased most of Dant's assets, including virtually all of its machinery, equipment, furniture, and work in progress, and some of its inventory and supplies. It also purchased Dant's goodwill, although this was of minimal value in the circumstances of this case. The asset purchase agreement was made conditional upon obtaining a lease of part of the premises which Dant had occupied prior to being put into receivership. From those premises, One-Vinyl, with the assistance of a workforce initially comprised almost entirely of former Dant employees, generated revenue by completing work in progress and selling it to former customers of Dant. It also performed deficiency work for a number of Dant's former customers, thereby facilitating the collection of some of Dant's accounts receivable, for which One-Vinyl received a commission from Dunwoody. After the vinyl windows designed by Mr. Heusser had been approved for use in construction and the plant and equipment had been modified to produce them, One-Vinyl solicited orders from a number of companies, including former customers of Dant. Two-thirds of One-Vinyl's sales during its first four months of operation came from such customers. Other elements of continuity between Dant and One-Vinyl include the technical, production, sales, and labour relations expertise of Mr. Heusser; the managerial skills of two of Dant's former foremen; and the telephone number of the business.

19. As contended by counsel for One-Vinyl, the right to produce the vinyl windows designed by Mr. Heusser is a valuable asset which One-Vinyl acquired not from Dant, but directly from Mr. Heusser. However, as submitted by Union counsel, innovation and product improvement are normal aspects of a business. In this regard we note that prior to the receivership, Mr. Heusser had been negotiating with Dant with a view to having Dant manufacture the new windows. But for the receivership, those negotiations might well have resulted in Dant gaining the right to manufacture the windows which are now being made by One-Vinyl. Dant's acquisition of that right from Mr. Heusser would not have terminated the Union's bargaining rights, and we are not persuaded that section 63 should be construed in such a manner that One-Vinyl's acquisition of that right from him will have that effect.

20. The facts of the present case are clearly distinguishable from those to which counsel for One-Vinyl referred in argument, including *Dufferin Steel Company, Awico Division, supra*, on which he placed considerable reliance. In that case, a change from production of ornamental iron and miscellaneous steel for a number of customers to production of plate for a single customer was found to support the contention of the alleged successor employer that there had been no sale of a business within the meaning of section 63, in a situation in which the alleged successor did not purchase raw materials, inventories or receivables from the predecessor; refused \$700,000 worth of work on the books of the alleged predecessor; and did not employ persons in on-site erection and installation (i.e., the persons represented by the applicant trade union in that case) as the predecessor had done. Where (as exemplified by that case) contemporaneously with or immediately after completion of a transaction which is alleged to constitute a sale of a business, the alleged successor employer changes the character of the enterprise such that it is substantially different from

the business of the alleged predecessor employer, this may result in a finding that no sale of a business has in fact occurred. However, to support such a finding, the change must be of a substantial nature, as indicated by the Board decisions in *Provincial Fruit Company (Ottawa) Limited*, [1975] OLRB Rep. Nov. 830 (in which the Board stated that a variation in the type of fruits and vegetables sold did not preclude a finding that there was a continuation of the business since both before and after the sale the employers were engaged in the sale by wholesale of fruit and vegetables); *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691 (in which the Board found successorship to have occurred despite an alteration in the type of vegetables canned); and *Hughes Boat Works Incorporated, supra* (in which the nature of the business was held to continue to be that of construction and sale of boats notwithstanding that there had been some design changes).

21. If a substantial change in the character of a business is made after the business has been sold but within the time frame specified in section 63(5) of the Act, that provision gives the Board a discretion to terminate the bargaining rights which have become binding upon the purchaser as a result of subsection (2) or (3). However, counsel for One-Vinyl expressly indicated that his client does not rely upon section 63(5), no doubt in recognition of the narrowness of that provision as described by the Board in *Vaunclair Meats Limited*, [1981] OLRB Rep. May 581, at paragraph 31:

Section 55(5) [now section 63(5)] provides for the termination of bargaining rights only where there has been a *substantial* change in the character of the business occurring within sixty days of the sale. Both the language and the context suggest that this exception to the general rule is intended to be an exceedingly narrow one. The temporal limitation also suggests that section 55(5) should only be applied to exceptional situations in which a person purchases a business organization then turns it into something quite different operating in an entirely unrelated labour and product market (a restaurant into a bowling alley, for example; or a tavern into an emporium for oriental rugs). In those circumstances, the successor is unlikely to have any intention of retaining the predecessor's employees, and it would make little sense to impose upon a new group of employees doing substantially different jobs, the wages and conditions negotiated with an entirely unrelated predecessor. In *Winco Steak and Burger Restaurant Limited*, [1974] OLRB Rep. Nov. 788, the Board suggested that any change which would make a business "substantially" different from the business of the predecessor, must necessarily involve "a fundamental difference, affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate, or unreasonable in all the circumstances". We adopt that view.

22. In the instant case, a workforce which includes a substantial number of former Dant employees is using equipment that was formerly Dant's to manufacture vinyl windows, under the direction of some former members of Dant's management, at premises formerly occupied by Dant. As noted above, although the manufacturing process has been modified somewhat to reflect Mr. Heusser's new design, much of the work involved in producing the windows has not changed materially. Moreover, One-Vinyl also produces doors and door frames of the type produced by Dant, albeit by a process which requires some additional manufacturing of components which Dant purchased in subassembled form. Viewed as a whole, the evidence clearly indicates that One-Vinyl did not merely purchase assets, but rather acquired from Dant (through Dunwoody) a "business" within the meaning of section 63 of the Act. The evidence further indicates that there has not been a substantial change in the character of the business.

23. A petition has been filed with the Board by a group of employees in opposition to this application. In the context of an application for certification or an application for termination of a trade union's bargaining rights, such a petition generally prompts the Board to direct that a representation vote be taken, where the petition is numerically relevant and is duly proven to be voluntary (by means of oral evidence of the type contemplated by section 73(5) of the Board's Rules of Procedure). No one appeared on behalf of the group of employees at the hearing of this matter, nor did anyone seek to adduce evidence concerning the origination and circulation of the petition.

Had anyone done so, the Board would not have permitted such evidence to be adduced, because a simple sale of a business such as the one which occurred in this case does not give employees an opportunity to terminate a trade union's bargaining rights. In declining to enquire into the voluntariness of such a petition, the majority of another panel of the Board wrote, in part, as follows in *Collingwood Fabrics Inc.*, [1985] OLRB Rep. Feb. 228 (after setting forth the facts of the case):

3. These facts disclose a section 63 "sale of a business" in its simplest form, and the respondent company, once it had retained the services of qualified labour counsel, was quick to acknowledge that. Since that time, however, a group of employees employed in the transferred operation, have filed a petition with the Board, indicating that, under the new management, they no longer wish to be represented by the applicant trade union. The only issue at the hearing before the Board, therefore, was the relevance and timeliness of that statement from employees.

4. Section 63 provides:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

• • •

(6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of the any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade

unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and

- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

• • •

(10) For the purposes of sections 5, 57, 59, 61 and 123, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 7.

Employee "petitions" are normally verified by the Board by conducting a representation vote, and as can be seen, subsection (8) provides the Board with a power to order the taking of a representation vote. As pointed out, however, in the recent case of *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887, the Board has never considered it appropriate to have resort to such a vote other than in circumstances where subsection (6) (or, in the public sector, subsection (11)) applies. A simple sale of a business by itself, in other words, has not been viewed by the Board as an appropriate circumstance to place in question a trade union's bargaining rights. This is particularly so in light of the express terms of section 63(10), which create an over-ride of, *inter alia*, the "termination of bargaining rights" provisions of section 57 of the Act. Section 57 enables the Board, upon receipt of a voluntary "petition" signed by at least 45 per cent of the employees in the bargaining unit, to ascertain the current wishes of employees by way of conducting a representation vote. To give effect to the present petition by ordering a similar representation vote would seem to fly in the face of section 63(10).

See also *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887, at paragraph 26:

On its face, section 63(8) gives the Board an unfettered discretion to direct a representation vote in the course of disposing of an application under section 63 of the Act; however, there are some logical limitations on the exercise of that discretion. A representation vote is intended and designed to determine representation issues. The existence of a sale of business settles the question of representation dealt with by subsections (2) and (3); a representation vote is of no assistance in determining whether a sale has occurred (see *Vaunclair Meats Limited*, *supra*, at ¶33) and the mere existence of a sale does not raise or make timely a reappraisal of representation rights....

Our conclusion concerning the irrelevance of the petition filed in this case does not, of course, preclude any employee in the bargaining unit from filing a termination application under section 57 of the Act when such application becomes timely.

24. For the foregoing reasons, the Board hereby declares that a sale of a business from Dant to One-vinyl (through Dunwoody) occurred on or about March 30, 1988.

1194-88-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Dowty Canada Electronics Limited, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Representation Vote - Request for a second representation vote because one person who may have cast the deciding ballot resigned on the working day following the vote - Resignation after vote not warranting the taking of another vote - Objectors and respondent requesting after vote that bargaining unit be redefined so as to exclude employees in the engineering department - Untimely request dismissed

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *B. L. Armstrong* and *W. A. Correll*.

APPEARANCES: *Clare Meneghini*, *Maureen Kirincic* and *Elaine Scott* for the applicant; *Peter F. Chauvin* and *David Crook* for the respondent; *Henk Bowhieson* and *Gary Prvtchick* for the objectors.

DECISION OF THE BOARD; November 30, 1988

1. In a decision dated September 22, 1988, the Board (differently constituted) wrote, in part, as follows:

1. This is an application for certification in which the parties have reached agreement on all matters in dispute, with the exception of the matters described below, and consented to the Board issuing a decision in this matter without a formal hearing before a panel of the Board.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The parties are in partial agreement concerning the description and composition of the bargaining unit. The language to which they have agreed is:

all employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, and office and sales staff.

The applicant contends that "professional engineers" should also be excluded from the bargaining unit. It is the respondent's position that "professional engineers" should not be excluded from the bargaining unit in that they (allegedly) share a community of interest with the other employees in the bargaining unit.

4. The Board is satisfied that regardless of whether the respondents' professional engineers are included in or excluded from the bargaining unit, not less than forty-five per cent (and not more than fifty-five per cent) of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 30, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act. Accordingly, pursuant to section 7(2) of the Act, the Board directs that a representation vote be taken in respect of the following bargaining unit:

all employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, and office and sales staff.

5. All those employed in the bargaining unit on September 9, 1988, who are so employed on the date the vote is taken will be eligible to vote.

6. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

7. In view of the parties' disagreement with respect to professional engineers, the Board directs that any ballots cast in the representation vote by professional engineers be segregated pending further direction by the Board, unless otherwise agreed by the parties.

....

9. Section 6(4) of the Act provides as follows:

A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but, the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of such professional engineers wish to be included in such bargaining unit.

Having regard to that provision and to the agreement of the parties, the Board directs that a vote be conducted, concurrently with the aforementioned representation vote, to determine whether or not a majority of the respondent's professional engineers wish to be included in the aforementioned bargaining unit with other employees of the respondent. The professional engineers concerned will be asked to indicate whether or not they wish to be included in the following bargaining unit with other employees of the respondent:

all employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, and office and sales staff.

....

2. The votes directed by that decision were taken on September 30, 1988. The two professional engineers who cast ballots in the vote directed by paragraph 9 of that decision both indicated by their ballots that they wished to be included in the aforementioned bargaining unit with other employees of the respondent. The ballots which they cast in the representation vote directed by paragraph 4 of that decision were segregated and not counted, in accordance with the direction contained in paragraph 7. The applicant subsequently notified the Board that it was withdrawing its challenge to the inclusion of those two persons in the bargaining unit. However, their ballots have remained segregated and uncounted as they could not materially affect the outcome of the vote, in which fourteen ballots were marked in favour of the applicant and eleven ballots were marked against the applicant.

3. Following the taking of those votes, the respondent and the objectors filed statements of desire (in accordance with section 70(1) of the Board's Rules of Procedure) requesting that a hearing be held in respect of their request that another representation vote be directed on the basis that Catherine Allison, a vocal proponent of the applicant who may have cast the deciding ballot in the vote, resigned from the employ of the respondent on the working day following the vote. Accordingly, as required by section 70(4) of the Rules, a hearing was held before this panel of the Board on November 22, 1988, for the purpose of hearing evidence and representations concerning the matters raised in those statements of desire. At that hearing, the parties advised the Board that it would be unnecessary to hear any evidence as they were content to argue the matter on the basis of the agreed facts set forth in the next paragraph.

4. On Monday, September 26, 1988, Catherine Allison dropped off an application for employment at Pebra, another employer in Peterborough. On Wednesday, September 28, Pebra called Ms. Allison's father and set up an interview for Friday, September 30 at 2:00 p.m. On Friday, September 30, Ms. Allison cast her ballot in the aforementioned representation vote between 11:30 and 12:30, and then went to her interview at 2:00 o'clock. Ms. Allison was one of 120 persons who were to be interviewed by Pebra for five openings. At her interview, Ms. Allison was told that Pebra would let her know on the following Monday or Tuesday whether or not she had been

selected to fill one of those openings. Around noon on Monday, October 3, Ms. Allison received a call from Pebra and was advised that she had been hired. She told Pebra that she could start work on Wednesday October 5 at 3:00 p.m. Ms. Allison then went to her supervisor, Vicky Byer, and advised her that she had been hired by Pebra. Ms. Byer congratulated her and told her to turn in her time card. Accordingly, Ms. Allison left around 12.45 p.m. and subsequently commenced employment with Pebra.

5. As indicated above, the respondent and the objectors contend that another representation vote should be directed in the circumstances of this case. It is their position that Ms. Allison should not have been entitled to vote as she did not have a sufficient interest in the future of the Company. The objectors also contend that with Ms. Allison's departure, the respondent's work-force is evenly split on the matter of whether the applicant should be certified, making it "unworkable to come to any kind of agreement in the bargaining unit." The applicant, on the other hand, submits that Ms. Allison was entitled to vote, and opposes the directing of another representation vote.

6. As noted by counsel for the respondent in his able submissions, it is well established that persons on indefinite layoff are not permitted to cast ballots in representation proceedings. See, for example, *Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723, and *Custom Aggregates*, [1978] OLRB Rep. March 215. Moreover, as indicated in the latter decision, the Board has ordered that a second representation vote be taken where the work force has been artificially built up with a view to influencing the outcome of a representation vote. However, the Board has also held that the departure of an individual from the employment of a respondent following the taking of a representation vote neither disenfranchises that person nor necessitates the taking of another representation vote. In *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. April 461, another panel of the Board wrote, in part, as follows in unanimously rejecting a request that a second vote be taken on the basis that one of the voters (Ingrid Cereghini) had given written notice to her employer on the day before the vote that she was terminating her employment at the conclusion of the working day following the vote:

12. We deal firstly with whether Miss Cereghini was entitled to vote. On this question, given the wording of the Board's order, there can be little doubt. There is an obvious difference between notice of an intention to terminate one's employment and actual termination. On the day of the vote Miss Cereghini was an employee at work in the bargaining unit. She did not terminate her employment until the end of the following day. It cannot be seriously contended that Miss Cereghini was not entitled to vote according to the plain wording of the Board's order. On the day of the vote she was an employee in the bargaining unit as of January 8, 1980 who had neither been discharged nor voluntarily terminated her employment.

13. The more substantial issue is whether in these circumstances the result of the vote should be allowed to stand. Counsel for the respondent made two submissions in this regard. First he maintains that the employee's notice of her intention to terminate her employment is in the nature of an irrevocable document which should foreclose her right to influence the outcome of the representation vote. Secondly, he argues that, apart from her intention, because her interest in the bargaining unit ended on the day after the vote her ballot should not be allowed to influence the outcome.

14. There is, of course, no evidence before the Board to indicate which way Miss Cereghini marked her secret ballot. Nor should this Board give any credence to the assumption implicit in the employees' representations that conducting a second vote without her participation would alter the outcome. The secrecy of the ballot and the clear legislative intention to safeguard the wishes of individual employees enjoins the Board and the parties before it from engaging in that kind of speculation.

15. Certification is the primary process in *The Labour Relations Act*. It is the means by which

the wishes of employees for representation are transformed into the affirmative right of a union to bargain collectively on their behalf with their employer. Generally, apart from exceptional cases involving extreme unfair labour practices, certification is accomplished by an application of majoritarian principles. A union can be certified by demonstrating support in excess of 55% of the bargaining unit through membership cards. It can also be certified by obtaining a simple majority of the ballots cast in a representation vote. These are the two normal routes to certification under the Act. Both of these procedures require the application of percentages to a defined number of employees. Because employees may continuously come and go through hiring, lay-offs, leaves of absence, quitting and discharge, the Board has had to devise some general rules to apply in order to fix a clear and stable figure of employees in a given bargaining unit for the purposes of an application for certification.

16. There are a number of ready illustrations of those rules. The Board has devised, for example, a "terminal date" as a cut off point for assessing the number of membership cards filed by a union and statements in opposition to certification filed by employees. The Board refers to the date that an application is filed for assessing the number of employees in the bargaining unit. (See *R. v. OLRB, Ex parte Hannigan*, [1967] 2 O.R. 469 (C.A.)). And it has developed a "thirty day rule" to determine whether an employee absent on the date of application is to be counted within the bargaining unit for the purposes of the application (*Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840). The Board has also evolved "a seven week rule" as a rule of thumb to assess which employees will be viewed as full-time and which as part-time for the purposes of an application. (*Sydenham District Hospital*, [1967] OLRB Rep. May 135). These are procedural constructs whose application may mean victory or defeat for either party in any particular application. If all of the lines established by these rules were to be redrawn on a case by case basis the certification process would come to a standstill. These established principles are known to the labour relations community and parties coming before the Board can plan on the basis of them. While none of the above rules are entirely inflexible, there is a substantial onus on any party who seeks to have the Board depart from them in a particular case. (*Trenton Memorial Hospital*, [1980] OLRB Rep. Jan.)

17. The line which the Board has traditionally drawn respecting the eligibility of employees to vote, namely that the employee be in the bargaining unit both on the date that the vote is ordered (or on the terminal date in a pre-hearing vote or as otherwise agreed by the parties) and on the date the vote is taken, is clear and well known through the Board's published decisions, its practice notes (see Practice Note No. 9, August 1964) and its layman's handbook. While originally the Board merely stated that employees in the bargaining unit would be entitled to vote (see e.g., *The Borden Co. Ltd.*, (1946), 46 CLLC ¶16,461) it evolved the two-pronged eligibility rule to give greater clarity and certainty to voter's lists, as well as to eliminate the possibility of an employer influencing the outcome of a vote by hiring new employees. The Board's practice and the principles underlying it were well canvassed in *J. McLeod & Sons Ltd.*, [1970] OLRB Rep. Feb. 1316.

18. In this case the respondent and the objecting employees invite the Board to adopt a different rule. They submit that if an employee has indicated an intention to leave the workplace he or she should not be permitted to influence the outcome of a representation vote. When pressed on the point, however, they are less than clear as to how that principle can be applied in any general way. Is an employee to be deprived of his franchise if, before a representation vote, he indicates an intention to leave his employment within three weeks of the vote? Or three months? Or six months? And is the result of a closely contested vote to be disturbed if an employee who voted is transferred, quits or is discharged within a day or two after the vote? The Board must obviously adhere to a rule that gives some certainty and finality to the granting of bargaining rights and which can be readily understood and applied by the parties.

19. The Board's past decisions give considerable guidance in the application of the rules regarding the eligibility of employees to vote in the selection of a bargaining agent. Employees on lay-off without a definite date of recall have been held ineligible to vote (*Rix Athabasca Uranium Mines Limited*, [1961] OLRB Rep. July 127.) The Board has found that a person who was an employee in the bargaining unit on the date the vote was ordered and was promoted to acting foreman on the date the vote was taken was ineligible to cast a ballot, notwithstanding that he later returned to the bargaining unit (*Success Display Limited*, [1971] OLRB Rep. Oct. 636). An employee who was absent on Workmen's Compensation on the date the vote was ordered

and on the date the vote was taken, but who had neither quit nor been terminated was found eligible to vote (*Alex's Plumbing and Heating limited*, [1970] OLRB Feb. 1321). Where, on the other hand, an employee who was absent due to illness had been treated in all respects as terminated and had no real prospect of returning to work, the Board concluded that he was not eligible to vote (*Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723).

20. The Board's rule respecting eligibility to vote has sought to strike a balance. On the one hand the Board recognizes the interest of employees with a stake in future collective bargaining having a controlling voice in the choice of a bargaining agent. On the other hand it faces the necessity of establishing a democratic process with some finality in situations where employees are subject to varying degrees of turnover. From the Board's earliest days employees were not removed from the voter's list unless they had left their employment before the taking of the vote. The only recorded exception to this appears to have been in wartime: under P.C. 1003, the *Wartime Labour Relations Regulations*, the Board's practice was to exclude from voting eligibility an employee who prior to the taking of the vote had obtained a separation notice pursuant to Selective Service regulations. An employee subject to that irrevocable step was viewed as no longer sufficiently interested in employment relations in the plant to be entitled to influence the outcome. (*Packard Electric Co. Ltd.* (1944), 46 CLLC ¶16,424). There appears to be no other recorded variation from the Board's rules.

21. The Board's voter eligibility rules are not intended and do not purport to achieve a standard of perfect decimal point democracy, assuming such a standard can ever be achieved. The rules seek nothing more than to establish a substantially representative group of employees with a minimum of employment continuity for the purposes of certification. Any deliberate attempt to manipulate the eligibility rules and temporarily "pack" the voting constituency to influence the outcome of the vote can be dealt with through the Board's remedial authority in unfair labour practices (see, e.g. *Custom Aggregates*, [1978] OLRB Rep. Mar. 215). Any distortion in the selection process caused by a planned and *bona fide* substantial increase in the size of the bargaining unit in the near future can be accommodated by the application of the Board's build-up principles (*Emil Frant* 57 CLLC ¶18,057; *McCord Corporation*, [1965] OLRB Rep. June 203; *Domco Foodservices Limited*, [1980] OLRB Rep. Jan. While the Board deals with these kinds of substantial changes in the bargaining unit, it cannot concern itself with the inevitable fact that some employees who are eligible to vote may have a more temporary or transitory interest in their jobs than others.

22. The Board has long recognized the right to vote of employees who are transitory, so long as they conform to the minimum requirement of the Board's two pronged eligibility rule. If they are employed on the date the vote is ordered and continue to be employed to the date the vote is taken, they are entitled to vote. In *J. McLeod & Sons*, [1969] OLRB Rep. Dec. 1100, the Board confirmed the eligibility to vote of a group of employees who fell within the eligibility dates but who in fact had been hired temporarily. They were strikers from a nearby plant who expected to return to their normal employment at some indefinite future date. And in *University of Toronto*, [1974] OLRB Rep. May 267, the Board confirmed the right to vote of all teaching assistants and research assistants employed by the University even though the vote was conducted in May, at the end of the academic year, and a turnover rate of 25 per cent to 35 per cent of the bargaining unit was projected for the next academic year.

23. The selection of a bargaining agent under the Act cannot be conducted on the basis of an ongoing referendum geared to the daily, weekly or monthly changes in the people who make up a bargaining unit. But bargaining rights are not necessarily permanent, and the Act allows for shifts in the wishes of employees whether through the turnover of personnel or otherwise. Any changes in the sentiment of a majority of the employees about union representation over time can be dealt with through the provisions of the Act for the termination of bargaining rights.

24. On the basis of the foregoing policy considerations, the Board is not persuaded that it should depart from its normal practice in this case to disturb the results of the representation vote. Moreover, the Board cannot agree, even given that Miss Cereghini did leave her job the day after the vote, that she had no interest in its outcome. (In this regard, it is doubtful whether the Board would again apply the narrow wartime rule in the *Packard Electric Co. Ltd.* case, *supra*). When the parties go to the bargaining table much is negotiable, including the possibility that the union will obtain wage increases and other benefits that are retroactive to the period of her

employment. They might also negotiate a seniority formula that would give her credit for her past employment in the event of her return. An employee in the position of Miss Cereghini does have a genuine interest in the outcome of a representation vote.

We respectfully agree with and adopt that reasoning. Furthermore, we are of the view that an employee in the position of Ms. Allison has an even greater interest in the outcome of a representation vote than a person in the position of Ms. Cereghini. The agreed facts set forth above indicate that at the time Ms. Allison cast her ballot, she did not know whether or not she would be hired by Pebra. She was merely one of the 120 persons who had been interviewed in respect of five openings. It was not until the following Monday that she was advised by Pebra that she had been hired.

7. For the foregoing reasons, we have concluded that Ms. Allison, who was an employee of the respondent on September 9, 1988 (when the voters' list was agreed to by the applicant and the respondent) and on September 30, 1988 (when the representation vote was taken), was entitled to cast a ballot in the representation vote. We have also concluded that her subsequent resignation from the employ of the respondent does not warrant the taking of another representation vote.

8. At the November 22 hearing, the objectors also requested the Board to redefine the bargaining unit so as to exclude from it the employees in the respondent's engineering department. In support of that request, the objectors' spokesperson asserted that it is only the respondent's shop employees who want union representation. The objectors' request was supported by the respondent but opposed by the applicant.

9. Having duly considered the submissions of the parties, we are not prepared to redefine the bargaining unit at this belated juncture. With the exception of the issue of whether "professional engineers" should be excluded from the bargaining unit, the applicant and the respondent agreed to a bargaining unit which includes employees in the respondent's engineering department. Counsel for the respondent advised the Board that this agreement was based upon Board decisions (such as *Lumonics Inc.*, [1985] OLRB Rep. March 442; *Resco Chemicals & Colours Ltd.*, [1986] OLRB Rep. Apr. 544; and *Fildebrandt Precision Industries Limited*, [1983] OLRB Rep. March 361) which have found production and technical employees to share a community of interest in the "high tech" field. Although counsel for the respondent now suggests that this approach may not be appropriate in respect of the respondent's operations, no such suggestion was made prior to the Board's aforementioned decision dated September 22, 1988, in which the Board adopted the bargaining unit description agreed to by the applicant and the respondent. Moreover, the representation vote was directed on the basis of the level of membership support which the applicant enjoyed in that bargaining unit at the pertinent time. To permit the respondent to resile from that agreement now that it knows the results of the representation vote would be inimical to sound labour relations and prejudicial to the applicant. It would also be inappropriate to redefine the bargaining unit at this point on the basis of representations which could have been made by the objectors prior to the representation vote, had they availed themselves of the opportunity to attend the hearing of which they were notified by the Board's Form 6, Notice to Employees of Application for Certification and of Hearing.

10. For the foregoing reasons, the Board declines to direct that another representation vote be taken in respect of this application, and further declines to redefine the bargaining unit.

11. As indicated above, on the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast were marked in favour of the applicant.

12. A certificate will issue to the applicant in respect of the following bargaining unit:

all employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, and office and sales staff.

For the purposes of clarity, the Board notes that professional engineers and other employees in the respondent's engineering department are included in the bargaining unit.

13. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots not be destroyed is received by the Board from one of the parties before the expiration of such thirty day period.

1067-88-G; 1068-88-G; 1465-88-JD United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Dufferin Construction Company**, Respondent; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. The Foundation Company of Canada Limited, Respondent; Labourers' International Union of North America, Local 183, Complainant v. Dufferin Construction Company, a Division of St. Lawrence Cement Inc. and United Brotherhood of Carpenters and Joiners of America, Local 27, Respondents

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Sector Determination - Issue of whether the work which is central to the referrals and the jurisdictional dispute is work in the ICI sector - Board deciding procedural context in which determination should be made - Sectoral determination to be made prior to considering any other issue - Panel which hears this issue will hear merits of jurisdictional dispute

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *J. James Nyman*, *Leanne Chahley* and *Lorenzo Monaco* for United Brotherhood of Carpenters and Joiners of America, Local 27; *Bruce Binning* for Dufferin Construction Company; *Carl Peterson* and *Denis Flynn* for The Foundation Company of Canada Limited; *L. Steinberg* and *R. Lotito* for Labourers' International Union of North America, Local 183; *Jim Thomson* for Carpenters Employer Bargaining Agency; *Joseph Liberman* for The Heavy Construction Association of Toronto.

DECISION OF THE BOARD; November 4, 1988

1. Files No. 1067-88-G and No. 1068-88-G are two referrals to the Board of grievances in the construction industry concerning the interpretation, application, administration or alleged violation of a collective agreement for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*. File No. 1465-88-JD is a complaint filed under section 91 of the Act concerning a dispute over an alleged assignment of work.

2. The grievances allege that Dufferin Construction Company (hereafter "Dufferin") and The Foundation Company of Canada Limited (hereafter "Foundation") have contravened the hiring and/or subcontracting provisions of the Carpenters' Provincial Agreement which applies in the industrial, commercial and institutional [ICI] sector of the construction industry respecting a

project at Terminal 3 of Pearson International Airport. The complaint under section 91 of the Act alleges that the grievances constitute a requirement of Dufferin to assign the work which is the subject matter of the grievances to members of the United Brotherhood of Carpenters and Joiners of America, Local 27 (hereafter "Carpenters Local 27") instead of to members of the Labourers' International Union of North America, Local 183 (hereafter "Labourers' Local 183").

3. The two grievances were referred to the Board on August 2, 1988, and on August 15th were adjourned *sine die* on consent of the parties while they attempted to settle their differences. The section 91 complaint, naming Carpenters Local 27 as a respondent, was made on September 16, 1988, and the Registrar advised the parties to that complaint that there would be a pre-hearing conference for the complaint held on November 15, 1988, before a panel of the Board. On October 11, 1988, the Registrar relisted the two grievance referrals for hearing on November 2, 1988, in response to a request made on October 6th by Carpenters Local 27. Its purpose was to receive the representations of the parties respecting Carpenters Local 27's request to have the Board determine whether the work which is the subject matter of the grievances is work within the ICI sector of the construction industry. The hearing took place as scheduled. While the section 91 complaint was not listed for hearing together with the grievances, the parties to that complaint and others having an interest in it were given notice of the hearing into the two grievance referrals and were represented at that hearing.

4. The parties agree that there is a question of whether the work which is central to the two referrals and to the complaint under section 91 is work in the ICI sector of the construction industry and that the Board must determine that question pursuant to section 150 of the Act. They disagree on the procedural context in which that determination should be made. Carpenters Local 27 takes the position that the Board should make the determination before dealing with any other issues relevant to either the referrals or the jurisdiction dispute. All of the other parties take the position that this panel of the Board should adjourn the two referrals *sine die* and defer the sector issue to the panel which will conduct the pre-hearing conference in the jurisdiction dispute.

5. Section 150 of the *Labour Relations Act* states:

150. The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).

6. In the course of proceedings before the Board, when an issue arises as to whether work performed or to be performed by employees is within the ICI sector, the question of whether it will be dealt with prior to any other relevant issues in the proceedings or concurrently with the other issues is usually decided on the basis of what would be the most efficient and expeditious manner of proceeding. See *Steen Contractors Limited*, [1987] OLRB Rep. Jan. 137; *Armbro Materials and Construction Limited*, [1986] OLRB Rep. May 579; and, *West York Construction*, [1980] OLRB Rep. Jan. 119. Each of the two opposing factions herein make the claim that the procedural approach which it recommends would achieve that objective. The parties opposed to Carpenters Local 27 claim that it would be more efficient to have the sector issue dealt with in the context of the section 91 complaint and that it should be left to the pre-hearing conference panel in that complaint to decide the procedural issue; that is, to decide whether the determination of the sector issue should be made prior to the jurisdiction complaint proceeding on its merits or be heard concurrently with the merits of that complaint. Part of their argument was that the pre-hearing conference panel would be better placed to deal with the procedural issue because, if the Board follows its usual practice of standing down grievance referrals in deference to a jurisdiction dispute where that dispute is an underlying element of the grievance, the jurisdiction dispute would have to be

determined before the two grievances could proceed. In addition, they take the position that much of the evidence relevant to the sector issue would be relevant to the jurisdiction dispute and should be heard by the panel which deals with the merits of that dispute so as not to have to be adduced in two separate proceedings. Finally, as the Board understands the submissions of counsel for Dufferin, it is his position that the determination of the sector issue involves a detailed examination of the skills, equipment and work practices associated with the performance of the work in issue. Therefore, determination of the section 150 issue in this case may be determinative of the trade to which the work should be assigned. That being the case, according to counsel, the section 150 issue herein should be heard in the context of the section 91 complaint.

7. The Board disagrees that the pre-hearing conference panel would be any better placed than the panel herein to decide whether the sector issue should be heard concurrently with the jurisdiction complaint. The pre-hearing panel will not be the panel which hears the merits of that complaint and no member of the panel will serve on the hearing panel. In the first place, little of the purpose of a pre-hearing conference in a jurisdiction dispute is likely to be accomplished while there is a serious question of whether the work is in the ICI sector. In the second place, if the panel herein were to defer the section 150 issue for determination in the context of the section 91 complaint, in our view, the pre-hearing panel should not answer the procedural question of whether the section 150 issue should be heard concurrently with the merits of the jurisdiction dispute. That more properly would be a decision for the panel hearing the merits of that complaint. If, however, that question is left to be decided by the panel assigned to hearing the merits of the jurisdictional dispute, and it decides that it should determine the sector issue before it deals with the other issues in the jurisdiction dispute, substantial time would have been wasted in getting the sector issue on for hearing. While the Board agrees that it would be more efficient to have the same panel which hears the evidence relevant to that issue also hear the jurisdiction complaint if it proceeds on its merits, deferring the sector issue until the jurisdiction complaint proceeds is not the only way of achieving that objective. The objective can be achieved by the administrative process of assigning the sector issue and the jurisdictional complaint to the same panel of the Board.

8. As the Board has noted above, the parties agree that a sector determination is needed with respect to the work which is central to the issues in all three files. There is no dispute that the issue impacts on the criteria of collective bargaining relationships and area past practice which are considerations in resolving jurisdiction disputes. In the Board's view, resolution of the sector dispute is likely to impact on the relevance of the criteria of employer preference and employer past practice as well. It is the Board's further view, therefore, that, in all of the circumstances of these proceedings, it is necessary for the Board to decide the issue of whether the work in dispute in the two grievance referrals and the jurisdiction complaint comes within the ICI sector of the construction industry prior to considering any other issue relevant to the two grievance referrals and before considering the section 91 complaint.

9. Having regard to all of the foregoing, the Board determines and directs that:

- (1) The pre-hearing conference scheduled for November 15, 1988, is to be adjourned *sine die*.
- (2) The Registrar is to list the matters in Files No. 1067-88-G, No. 1068-88-G and No. 1465-88-JD for hearing for the purpose of receiving the evidence and representations of the parties who have standing in the proceedings respecting a determination under section 150 of the *Labour Relations Act* as to whether the work which is the subject

matter of the disputes in the three files is work within the industrial, commercial and institutional sector of the construction industry.

- (3) The panel which hears the issue under section 150 of the *Labour Relations Act* shall be assigned to hear the merits of the complaint in File No. 1465-88-JD should that complaint proceed to hearing on its merits after the section 150 determination has been made.
- (4) With respect to the section 150 issue, any employer of employees who are working on or will work on the project where the work at issue is taking place, any trade union or council of trade unions which has bargaining rights for employees who are working on or will work on the project, any employee bargaining agency, employer bargaining agency, affiliated bargaining agent or employers' organization which represents employees, employers or trade unions as aforesaid, will have standing to participate in the section 150 determination. To that end, the United Brotherhood of Carpenters and Joiners of America, Local 27, Labourers' International Union of North America, Local 183, Dufferin Construction Company, The Foundation Company of Canada Limited, The Carpenters Employee Bargaining Agency, The Carpenters Employer Bargaining Agency and The Heavy Construction Association of Toronto have standing for purposes of the section 150 determination.
- (5) Those parties are directed to meet on November 15, 1988, with a Board officer to be assigned by the Registrar for the purpose of preparing a list of other persons who, in their view, are to be given notice of the proceeding respecting the section 150 issue.

10. These matters are referred to the Registrar for the serving of notices respecting the foregoing directions and for the assignment of the Board officer.

1532-88-R Service Employees International Union Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., Applicant v. **Estonian Relief Committee in Canada**, Respondent v. Group of Employees, Objectors

Certification - Charges - Membership Evidence - Practice and Procedure - Whether Board should entertain allegations with respect to the circumstances in which membership evidence was obtained when allegations not asserted in a timely fashion in accordance with section 72 of the Board's Rules of Procedure - Board having a discretion to hear the allegations - Only prejudice asserted is the prejudice of delay - No significant delay here because hearings continuing for the purpose of hearing non-pay allegation - Board consenting to the introduction of evidence with respect to the untimely allegations - Board explaining its "usual investigation" with respect to non-pay allegations - Further hearings scheduled

BEFORE: Owen V. Gray, Vice-Chair, and Board Members M. Rozenberg and D. A. Patterson.

APPEARANCES: *Steven Barrett* and *Allen Ferens* for the applicant; *Donald Francis*, *A. Kuuskne* and *A. Niitenberg* for the respondent; *Judith Christoforou*, *Meinhard Vabasalu* and *Aino Summa*, employees, in person.

DECISION OF THE BOARD; November 15, 1988

1. This is an application for certification. Having regard to the agreement of those who attended at the hearing of this matter ("the participants"), the title of this proceeding has been amended to describe the respondent as "Estonian Relief Committee in Canada".

2. The Board finds that the applicant is a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act").

3. Having regard to the agreement of the participants, we find that

all employees of the respondent in the Municipality of Metropolitan Toronto
save and except supervisors and persons above the rank of supervisor

constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The employees who attended at the hearing of this matter wish the Board to act on a document signed by two employees stating that they do not wish to be represented by the applicant. The document was filed with the Board on October 13, 1988. The terminal date fixed for this application was October 6, 1988. Subsection 73(1) of the Board's Rules of Procedure provides that "evidence of ... objection by employees to certification of a trade union ... shall not be accepted by the Board on an application for certification ... unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and ... is filed not later than the terminal date for the application." Form 6 notices were posted in the work place of these employees on October 3, 1988, notifying them of the application, the terminal date of October 6, 1988 and, among other things, the requirements of section 73 of the Board's Rules of Procedure with respect to the filing of evidence of employee objection to certification. The rule in section 73 is quite clear. It would require us not to take the subject document into account unless we were to extend the terminal date. We see no reason to do that in this case; accordingly, the document will not be taken into account.

5. The respondent and the employees who attended at the hearing of this matter wish the Board to entertain certain allegations with respect to the circumstances in which membership evidence was obtained. The applicant argues that the Board should not entertain those allegations because they were not asserted in a timely fashion in accordance with section 72 of the Board's Rules of Procedure. Section 72 is also referred to in the Form 6 notice, in a note which says this:

If you attend at the Board's hearing and wish to make representations about something other than employee objection to certification of the applicant, paragraph 4 does not apply. However, your attention is directed to section 72 of the Board's Rules of Procedure which applies in such situations and provides, in part, as follows:

72.-(1) Where a person intends to allege at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

...

(b) file a notice of intention that shall contain, a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred

and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

...

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included ... in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it thinks advisable.

6. The Form 6 notice and the notice that the employer received with respect to this application stated that the application would be heard on October 21, 1988. On October 19, 1988, counsel for the respondent employer delivered a letter to the Registrar to the following effect:

The Respondent Employer in the above-captioned matter has been advised by an employee that the in-house organizer(s) of the Union committed certain improprieties in connection with the solicitation of membership evidence.

Specifically, the in-house organizers told the employee in issue that she must sign a Union card or she would lose her job when the Union acquired bargaining rights. The employee in issue understands that the same in-house organizers told other employee on whose behalf membership evidence has been submitted the same or similar things.

The in-house organizers may well have made other statements to the employee in issue and other employees which fundamentally misrepresented the nature of the application and the significance of signing a Union card.

The letter went on to identify the employee by her initials and home address and to request that the Board inquire into the allegation. The Registrar caused a copy of this letter to be delivered to the applicant trade union, which says it received its copy late in the afternoon on October 20th.

7. Judith Christoforou, the employee referred to in the respondent's letter, was one of the employees in attendance at the hearing on October 21, 1988. She told the Board that the employees in attendance at the hearing wish to raise the following allegations:

1. The person who collected her application for membership told her at the time she signed that everyone else had joined and that "probably if you don't sign, when the union comes in, because it will come in, if you don't have a card you won't be in it, you'll be fired."
2. She later went to a union meeting at which she asked Allen Ferens, the organizer of the applicant, what would happen to people if they did not sign a card, whether they could be fired and what would happen to people who refused to join. She alleges he said that she had nothing to worry about if she had joined the union; others who had not signed would have to worry about being fired more than those who had signed, because those who had signed are protected by the union from being fired. She alleges that she and others understood from that that those who did not sign a card before the union came in would be fired if the union did come in.
3. During a time when the petition document was being circulated, other workers told her in a threatening tone "don't you dare take your name off."

Ms. Christoforou and her fellow employees say that these allegations, if proved, should lead us to direct that a representation vote be conducted even if the applicant has filed sufficient membership evidence to permit certification without a vote. Except to the extent that they coincide with the allegations in the letter referred to earlier, these allegations were not the subject of any written notice prior to the hearing of October 21, 1988.

8. Subsection (2) of section 72 of the Board's Rules of Procedure provides:

Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

With respect to the question of promptness in filing a statement of intention, counsel for the employer asserted that it had only learned on October 17th of the allegation set out in his letter. It had spoken to Ms. Christoforou on the 18th, and had then taken the position that it would not act on the information she provided unless Ms. Christoforou consented that it do so. She had withheld her consent until mid-day on October 19th, following which counsel's letter was promptly delivered to the Board.

9. On the subject of her delay in advising the Board of the allegations she wished it to entertain, Ms. Christoforou made a number of assertions. She said that when the Form 6 notice and accompanying notice to employees was first posted, she only glanced at them. She had not read them thoroughly until the week of October 17th. She had been afraid to write to the OLRB because "they kept saying 'don't you dare take your name off'." At some point after the terminal date, however, she *had* contacted the Board by telephone to see if it was too late to do anything. The receptionist who answered the phone told her that no one at the Board could advise her what to do and suggested that she contact a lawyer. She chose not to do that. She told the receptionist that she did not want to know what she *should* do but, rather, what she *could* do. She was then advised that she could speak to the Deputy Registrar, Mr. Bowman. Mr. Bowman was not then available to speak to her. She made no other attempt to speak to him. She also told us she had been afraid to raise these matters on her own, that she "didn't want to be alone on it", and had only recently realized that she was not alone.

10. The purpose of section 72 of the Board's Rules of Procedure was explained in *Trigiani Contracting Limited*, [1979] OLRB Rep. Feb. 141:

7. That section was a twofold purpose grounded in both legal considerations and in industrial relations considerations. The legal consideration implicit in section 47 [now 72] of the Board's rules of Procedure is a recognition of the rule of natural justice that anyone charged with wrongdoing should have sufficient notice of the charge against him. The labour relations consideration is a recognition that the realities of union organization are such that a delay of Board proceedings may serve to defeat the union. A union may successfully defend charges made against it only to discover, upon the late granting of a certificate, that its support among the employees has substantially eroded because, for reasons often not fully understood by rank and file employees, it has failed to get certified promptly and commence immediately to bargain on their behalf. For that reason section 47 [now 72] of the Board's Rules of Procedures seeks to strike a balance between natural justice and the avoidance of delay in certification proceedings or any other proceedings before the Board. In an application for certification both the interests of natural justice and industrial relations are best served when allegations of wrongdoing are made in sufficient time and with sufficient particularity that an applicant union is not prejudiced either by surprise or by being forced to seek adjournment and the delay of its own application. Therefore, where allegations against an applicant are not filed in a timely manner or with sufficient particularity the Board may refuse to entertain them. (*Fleck Manufacturing Limited* 62

CLLC ¶16,236; *Cable Tech Wire Company Limited* (as yet unreported) Board File No. 0297-78-R, June 21, 1978).

As the Board observed in *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 at paragraph 20:

The need for expedition in labour relations matters is well recognized: *Hotel and Restaurant Employees Union v. Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461 (C.A.); *Jordon v. York University Faculty Association* (1978) CLLC ¶14,132 (Div. Ct.); *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879*, (1979) 24 O.R. (2d) 400 (Div. Ct.); and, *Journal Publishing Company of Canada Ltd. et al v. The Ottawa Newspaper Guild, Local 204 et al*, (unreported, Ontario Court of Appeal, March 31, 1977) wherein Estey, C.J.O. (as he then was) observed:

In the law which has grown up around labour relations in this province, and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are [sic] labour relations defeated and denied.

Rule 72 applies to all parties to the process. In *Cable Tech Wire Company Limited*, [1978] OLRB Rep. June 496 (judicial review denied November 10, 1978, unreported) the Board refused to entertain allegations known to the employer for two weeks before notice thereof was finally given on the last business day before the Board's hearing. Counsel's excuse that he had until then been unaware that witnesses were available to prove the allegations was not considered sufficient reason for having withheld them. In *Gignac, Sutts, Nosanchuk*, [1973] OLRB Rep. Aug. 438, the Board refused to entertain union charges advanced in support of certification without a vote when the events alleged were known to the union for as much as a month before notice was given. In *Fleck Manufacturing Limited*, 62 CLLC ¶16,236, the Board refused to entertain objectors' allegations of impropriety in the union's collection of membership evidence, when the allegations were first raised at the hearing of the union's certification application although known to counsel for the objectors for nine days prior. In *Fleck* the Board said:

It is incumbent on all parties to proceedings before the Board to investigate matters relevant to their cases as early as possible and if they intend to make allegations of improper or irregular conduct against another party to do so promptly. The object of this requirement, which finds expression in section 48 [now 72] of the rules, is obviously to expedite and facilitate the hearing and processing of applications under the Act and to avoid prejudice, delay or embarrassment to the parties involved. Delayed and last-minute allegations, which lead to adjournments or cause prejudice, embarrassment [sic] or unnecessary expense to the other parties, and which with reasonable diligence could have been made at a more timely stage of the proceedings will not be entertained except for good and sufficient cause.

11. The applicant did not admit the truth of any of the assertions made by Ms. Christoforou in the course of the explanation she gave for her delay in asserting the allegations set out in paragraph 7 above. In view of the lateness of the hour, we undertook to consider whether, assuming her explanation to be true, we should entertain the allegations referred to in paragraph 7. At the end of the participants' argument on that point we reserved our decision and adjourned the hearing.

12. We agree with counsel for the applicant that Ms. Christoforou and her fellow employees had clear and adequate notice of the requirements of section 72 of the Board's Rules of Procedure. The applicant should not be made to suffer any significant delay in the disposition of these proceedings as a result of an employee's delay in reading the notices posted by the Board or an employee's failure to promptly seek advice or otherwise pursue the matter if he or she does not understand the contents of the notices.

13. Ms. Christoforou's delay is not excused by the fact that some fellow employee or employees told her "don't you dare take your name off." Those words are not exactly paralytic;

they did not paralyze even Ms. Christoforou. She was still able to make her enquiries of the Board. In this connection we note also that the explanatory Notice to Employees which was posted with the Form 6 Notices has something to say to employees who feel they have been threatened in connection with their opposition to an application for certification. That Notice includes the following information:

... In order to foster healthy collective bargaining, the *Labour Relations Act* gives a number of rights to employers, employees and trade unions covered by the Act. Conduct that violates those rights is prohibited. The Ontario Labour Relations Board, established by the *Labour Relations Act*, is a tribunal that has the authority to provide remedies for such violations.

What are the rights of an employee?

...

An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.

...

It is illegal for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filed with the Ontario Labour Relations Board.

14. It would appear to us from what Ms. Christoforou said that her delay in asserting her allegations had to do in large part with her unwillingness to oppose the trade union unless there were other employees prepared to give her moral support. Understandable as that feeling is, it does not justify a failure to comply with rules designed to ensure that certification and other Board proceedings are dealt with expeditiously. In these circumstances, the interest of expeditious disposition of matters involving certification outweighs Ms. Christoforou's interest in having these allegations heard if there is any conflict between the two. We would not entertain Ms. Christoforou's allegations if our doing so would entail any appreciable delay in the disposition of this application.

15. In the course of her recital of the matters which she wished to bring to the attention of the Board, Ms. Christoforou also alleged that the employee who collected cards from other employees in the unit had given another employee money to join the union. That allegation fell within the very narrow range of allegations into which the Board will conduct its own inquiry if it determines there is cause to do so: see *Unlimited Textures Company Limited, supra*, at paragraph 21 and *Laidlaw Wire of Canada, Ltd.*, [1985] OLRB Rep. Oct. 1479, at paragraph 22. Ms. Christoforou indicated that she could identify the collector and employee involved by name. At our request, she wrote those names on a piece of paper and handed it to the panel. Counsel for the applicant advised the Board that he was aware of the particulars of this allegation and prepared to deal with it by way of evidence at that time. We declined, however, to depart from the Board's usual practice of first conducting the "usual investigation" into any non-pay allegation.

16. The first step in that "usual investigation" is to see whether any membership evidence has been submitted in the name of the employee who it is alleged did not sign a card or make the payment referred to on the receipt or other documentary evidence of payment accompanying the card. The concern raised by a "non-sign" or "non-pay" allegation is that the Board has been invited to act on documentary evidence which may not reflect the truth about whether the person said to be a member has actually applied for membership or paid to the union on his own behalf the amount shown. If there is no document, there is no such concern. If there is a document purporting to be evidence of membership of the subject employee, a labour relations officer will interview that employee in private. If the interview discloses any matter which is cause for concern, either standing alone or in light of the contents of the Form 9 declaration filed by the union, the

Board will schedule the matter for hearing, summon those persons who may have knowledge of the matters in issue and, at the hearing, conduct its own inquiry. If a “non-pay” or “non-sign” allegation does not result in the Board’s scheduling a hearing, that is either because no membership evidence was filed with respect to the employee identified in the allegation or because the results of an interview with that employee raised no cause for concern. When it follows the “usual investigation”, a decision not to conduct an enquiry at hearing with respect to a “non-sign” or “non-pay” allegation reveals nothing about whether a card was or was not received with respect to the individual named in the allegation.

17. Having regard to subsection 111(1) of the Act, the Board is concerned that its process not reveal whether a card has or has not been signed by an employee or filed with respect to that employee unless it is persuaded that there is some genuine cause for concern which outweighs the concern addressed by subsection 111(1). The risk of unnecessarily revealing membership information is minimized by invariably responding to a “non-pay”/“non-sign” allegation by first conducting the “usual investigation” and by refusing to make the allegation the subject of a hearing unless the result of the investigation warrants one. If it were otherwise, employees could be made to testify about whether they had or had not taken steps to join a union merely because they had been named in a non-sign or non-pay allegation; pursuit by those opposed to certification of “scatter gun” allegations of “non-pay” or “non-sign” could essentially neutralize the protection afforded by subsection 111(1).

18. The “usual investigation” having since been conducted, we have determined that we should conduct a hearing with respect to the matter raised by Ms. Christoforou and, accordingly, it is appropriate to reveal the particulars of the transaction in question. The person who collected the card in question (and other cards) is Riya Kokko. The person whom Ms. Christoforou identified as having been given money by Ms. Kokko was Lydia Ender. Ms. Ender was interviewed by a Labour Relations Officer. She was shown a card submitted to the Board and apparently signed by her, on which Ms. Kokko is shown as the recipient of a payment of \$1.00 on account of membership fees. Ms. Ender acknowledged signing this card in the presence of Ms. Kokko. She indicated that after she signed the card, she and Ms. Kokko entered a restaurant where Ms. Ender “borrowed” a dollar from a co-worker and gave it to Ms. Kokko. She further stated that she repaid the co-worker the following day.

19. There is no reference to this loan in paragraph 3 of the Form 9 declaration filed in support of this application. As a result, we do not know whether the collector knew that Ms. Ender’s transaction with her co-worker was a loan rather than a gift, nor do we know whether the collector, and through her the Form 9 declarant, knew that the money would be or had been repaid the following day. The question whether the absence of any reference to this transaction in the Form 9 declaration casts doubt on the reliability of that declaration and of the membership evidence to which it refers may depend on the state of knowledge of the collector and Form 9 declarant. See generally *Laidlaw Wire of Canada Ltd.*, [1985] OLRB Rep. Oct. 1479 and *Calvano Lumber & Trim Co. Ltd.*, [1988] OLRB Rep. Aug. 735. That question cannot be resolved without the Board’s conducting an inquiry and hearing what the collector and Form 9 declarant have to say about the collector’s knowledge of the transaction and the nature of the inquiries made by the Form 9 declarant. The only question which we need to decide at this point is whether to conduct an inquiry. In the present state of the Board’s jurisprudence, we consider it prudent to do so. Accordingly, there will be a further hearing in this matter to which the following persons will be summoned:

Lydia Ender
 Riya Kokko
 Allen Ferens

20. In the result, this is an application for certification the hearing of which would not in any event have been completed on the first scheduled hearing date. The necessary further hearing can be so scheduled as to permit the hearing also of the allegations referred to in paragraph 7 without in any significant respect delaying the disposition of the application. We have found that Ms. Christoforou did fail to comply with the requirements of section 72 of the Board's Rules of Procedure. We have a discretion under subsection (2) of that section to nevertheless hear evidence with respect to the allegations referred to in paragraph 7. In our view, that is not a discretion which should be so exercised as to punish any party for failure to comply with subsection (1) of the section. Rather, the discretion should be exercised with regard to the prejudice, if any, which may be caused to other parties by entertaining the evidence notwithstanding of the failure to comply with subsection (1). The only prejudice asserted here is the prejudice of delay. In the circumstances, there will be no significant delay. That is so whether the reasons given by Ms. Christoforou for her delay are true or not. Accordingly, the Board does consent to the introduction of evidence with respect to the allegations outlined in paragraph 7 when the hearing of this matter resumes.

21. Accordingly, the Registrar is directed to list this matter for two days of hearing before this panel.

3337-87-R; 3338-87-R; 0052-88-U United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant/Complainant v. **Povoa Carpentry Trim** o/b 563808 Ontario Inc. and Labourers' International Union of North America, Local 183; F. J. Carpentry, Respondents v. Labourers' International Union of North America, Local 183, Intervener

Certification - Construction Industry - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Principal of employer told employees that it would be better if they joined the Labourers Union rather than the Carpenters Union - Breach of sections 64 and 70 - No evidence that Labourers Union participated in the employer's improper actions - Section 13 not applicable - Board declining to dismiss certification application

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *David McKee* and *Luis Camara* for the applicant/complainant; no one appearing for the respondent Povoa Carpentry Trim at the October 26, 1988 hearing; no one appearing for the respondent F. J. Carpentry; *Michael Mitchell*, *Tanya Lee* and *Quinto Ceolin* for the intervener.

DECISION OF THE BOARD; November 9, 1988

1. In its June 8, 1988 decision (reported at [1988] OLRB Rep. June 619) in this matter, the Board found that:

1. Board File Nos. 3337-87-R and 3338-87-R are applications for certification by the United Brotherhood of Carpenters and Joiners of America, Local Union 27 ("Local 27"). Local 27 is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

2. Board File Nos. 3337-87-R and 3338-87-R are applications for certification within the meaning of section 119 of the *Labour Relations Act* and are applications made pursuant to section 144(1) which provides:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

3. In Board File No. 3337-87-R, Local 27 seeks to be certified as the exclusive bargaining agent for a unit of employees of Povia Carpentry Trim, o/b 563808 Ontario Inc. ("Povia") which it describes, in paragraph 7 of its application, as:

(a) All Carpenters and Carpenters' Apprentices employed by the Employer in the Industrial, Commercial and Institutional Section of the Construction Industry in the Province of Ontario; *and*

(b) All Carpenters and Carpenters' Apprentices employed by the Employer in Board Area 8 excluding the Industrial, Commercial and Institutional Sector, save and except non-working Foreman and persons above the rank of the non-working Foreman.

In the same file, the Labourers' International Union of North America, Local 183 ("Local 183") has applied, by intervention, to be certified as the exclusive bargaining agent for a unit of employees of Povia which it describes, in paragraph 3 of its intervention, as:

All carpenters and carpenters' apprentices in the employ of the Respondent in Ontario Labour Relations Board Area 8 in all sectors of the construction industry, save and except the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

Local 183 is a trade union within the meaning of section 1(1)(p) of *Labour Relations Act*. Its application for certification is one within the meaning of section 119 of the Act but does not relate to the industrial, commercial and institutional sector of the construction industry referred to section 117(e) of the Act.

4. In Board File No. 3338-87-R, Local 27 is applying to be certified as the exclusive bargaining agent of employees of F. J. Carpentry ("F. J"), in a unit described, in paragraph 7 of the application, as:

(a) All Carpenters and Carpenters' Apprentices employed by the Employer in the Industrial, Commercial and Institutional Section of the Construction Industry in the Province of Ontario; *and*

(b) All Carpenters and Carpenters' Apprentices employed by the Employer in Board Area 8 excluding the Industrial, Commercial and Institutional Sector, save and except non-working Foreman and persons above the rank of non-working Foreman.

Local 183 has also applied, by intervention, for certification in that application. It seeks certification for a unit of employees it describes, at paragraph 3 of its intervention, as:

All carpenters and carpenters' apprentices in the employ of the Respondent in Ontario Labour Relations Board Area 8 in all sectors of the construction industry, save and except the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen.

Further, at paragraph 7(3) of its intervention Local 183 states:

The Intervener takes the position that the Respondent herein is actually the business name for two or three piece work carpenters who are employees of Povia Carpentry Trim o/b 563808 Ontario Inc., which is the Respondent in Board File 3337-87-R. The Intervener herein makes this application in the alternative and only in the event the Respondent herein is found by the Board to be an employer in its own right.

5. Board File No. 0052-88-U is a complaint under section 89 of the *Labour Relations Act*, by Local 27, alleging that Povia and Local 183 have dealt with Local 27 in a manner contrary to sections 3, 13, 64, 66, and 70 of the *Labour Relations Act*. Although it is not clear, on the face of the complaint, what relief Local 27 seeks, it is evident that the complaint is related to the application in Board File No. 3337-87-R.

2. These matters were heard together. No one appeared on behalf of F. J. Carpentry at any of the hearings. Povia Carpentry Trim o/b 563808 Ontario Inc. ("Povia") participated in the hearings on May 6 and June 20, 1988 when the United Brotherhood of Carpenters and Joiners of America, Local 27 ("Local 27") presented its evidence. It was not represented at the hearing on October 26, 1988 at which time Local 27 elected to call no further evidence, the Labourers' International Union of North America, Local 183 ("Local 183") elected to call no evidence, and the Board received submissions with respect to these matters.

3. In argument, Local 27 and Local 183 both sought to have the membership evidence filed in the F. J. Carpentry application (Board File No. 3338-87-R) transferred to their respective Povia applications (Board File No. 3337-87-R) and leave to withdraw the applications with respect to F. J. Carpentry. In the circumstances, the Board found it appropriate to transfer the membership evidence as requested and the applications in Board File No. 3338-87-R were withdrawn with leave of the Board.

4. We are satisfied, on the evidence before the Board, that Jose Lopez, the principal of Povia, told some of Povia's employees, who, if they were at work on the date of application, would be on the list of employees for the applications for certification in Board File No. 3337-87-R, that it would be better for the company and better for them if they became members of Local 183 rather than of Local 27. We are satisfied that this was an improper interference in the selection of a trade union by Povia and constitutes a breach of section 64 of the *Labour Relations Act*. It also constitutes an attempt to coerce those employees to become members of Local 183 and to refrain from becoming members of Local 27. Accordingly, it is a violation of section 70 of the Act as well. We are not satisfied that Lopez's conduct constitutes a breach of section 66.

5. There is support in the evidence for the allegations made in paragraph 2 of Schedule "B" of Local 27's complaint in Board File No. 0052-88-U. Further, as was rightly conceded by counsel for Local 27, there is no suggestion in any of the evidence that Local 183 participated in, or was even aware of, Lopez's improper actions as aforesaid.

6. Section 3 of the Act has been treated by the Board as being a declaration of rights rather than an unfair labour practice section.

7. Local 27 submitted that the Board should, pursuant to section 13 of the Act, dismiss Local 183's application with respect to Povia because of the company's improper conduct. In order for section 13 to apply, there must, in our view, be some complicity between an applicant trade union and an employer or employer's organization. In *Cabral Foods Inc.*, [1985] OLRB Rep. Feb. 165, the Board dealt with an assertion that section 13 (and, in that case, section 48) applies even in circumstances where a trade union is unaware that it has received employer support. The Board said, in part:

35. Counsel for the applicant argues that sections 13 and 48 had the effect he contended for even if CURRE had been unaware of the support it had received. With respect to the issue of "employer support", the following cases were referred to in argument by one or more of the parties' counsel: *Edwards & Edwards Limited*, 52 CLLC ¶17,027; *Swift Canadian Co. Limited*, 54 CLLC ¶17,071; *Navco Food Services Limited (Formerly National Automatic Vending Company Limited)*, [1971] OLRB Rep. Feb. 80; *Metal Textile of Canada*, [1971] OLRB Rep. Nov. 694; *Sunrise Paving and Construction Co. Ltd.*, 72 CLLC ¶16,060; *Zehr's Markets Limited*, [1972] OLRB Rep. June 635; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association of Nipawin, et al.*, (1973) 41 D.L.R. (3d) 6 (S.C.C.); *Smith Beveridges Limited*, [1975] OLRB rep. Dec. 956; *Veres Wire Industry Ltd.*, [1976] OLRB Rep. July 337; *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806; *Municipality of Casimir*, [1978] OLRB Rep. Feb. 130; *Coons Heating & Sheet Metal Limited*, [1978] OLRB Rep. June 525; *Japiamco Company Limited*, [1979] OLRB Rep. Feb. 106; *Addidas Textile (Canada) Ltd.*, [1980] OLRB Rep. May 639; *Tilco Plastics (1976) Limited*, [1980] OLRB Rep. July 1096; *Frusino Structure Inc.*, [1981] OLRB Rep. Mar. 271; *Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509; and, *Primo Importing and Distributing Co. Ltd.*, [1982] OLRB Rep. Dec. 1869. None of these cases supports the contention that sections 13 and 48 can apply to support of which the affected union is wholly unaware. Sections 13 and 48 must be interpreted with reference to their obvious purpose, which is:

... to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relations with their employer.

(*Edwards & Edwards, supra*).

In *Canada Crushed Stone, supra*, the Board described the purpose of section 13 (then section 12) this way at paragraph 27:

The broad purpose of the section, simply stated, is to preserve the integrity of the collective bargaining process by barring the application of any trade union which, because of employer support, does not owe its sole allegiance to those whom it seeks to represent. A trade union which has accepted the support of any employer whose interests may be affected by its representation places itself in a potential conflict of interest and thereby undermines itself as a union "qualified" to act on behalf of those it seeks to represent. Section 12 catches both the "sweetheart" arrangement between the parties directly affected and also the accepted support of any outside employer whose interests may be affected by the collective representation of those whom the union seeks to represent. In both instances *the union's acceptance of employer support activates the Section 12 bar*.

[emphasis added]

If a trade union's ability to be certified or to enter into binding collective agreements could be destroyed by unsolicited employer behaviour of which the union was totally unaware, sections 13 and 48 would cease to serve as protections from employer interference in employees' selection of a bargaining agent and, instead, become potent instruments for effecting just such interference.

(See also *Canadian Fabricated Products Limited, (Stratford)* 54 CLLC ¶17,090; *John Lester Drugs Ltd.*, [1982] OLRB Rep. June 886).

8. We agree, and to the extent that it is inconsistent with the *Cabral Foods Inc.* approach, we reject the approach taken in *Consbec Inc.*, [1986] OLRB Rep. July 937 upon which by counsel for Local 27 relied. (We note that the other authorities upon which Local 27 relied all involved situations in which there was some apparent complicity between the trade union concerned and an employer.)

9. Further, and in any event, we are satisfied that the breaches of the Act by Povia can be remedied by the Board in the exercise of its remedial authority under section 89 of the Act and that, accordingly, it is inappropriate to dismiss Local 183's application with respect to Povia.

10. Local 27's complaint that sections 3, 13, and 66 have been breached, and operate to preclude the Board from certifying Local 183 is therefore dismissed.

11. In the result:

- (a) the Board declares that Povia Carpentry Trim o/b 563808 Ontario Inc. has breached sections 64 and 70 of the *Labour Relations Act*;
- (b) directs that Povia Carpentry Trim o/b 563808 Ontario Inc. sign and post one copy, in each of the English and Portuguese languages, of the attached notice marked "Appendix" in conspicuous places at each of its premises and job sites, and to keep such notices posted for 60 working days, and to take all reasonable steps to ensure that the notices are not altered, defaced or covered up.

12. The Board will remain seized with respect to the implementation of this order.

13. At the first day of hearing in these matters, Povia indicated, through counsel, that it would file a list of employees with respect to the application in Board File No. 3337-87-R. It was tacitly agreed that the issues in that respect would be deferred. Povia never did file any list of employees.

14. Although there appears not to be any real dispute with respect to the appropriate bargaining unit descriptions, there are still a number of issues, including that one, which must be addressed and resolved before the Board can dispose of this matter. Accordingly, the Registrar is directed to schedule the applications in Board File No. 3337-87-R for hearing for the purpose of hearing the evidence and representations of the parties with respect to all remaining issues arising out of and incidental to them, including, but not limited to:

- (a) the bargaining unit description in each application;
 - (b) the list of employees in the bargaining unit in each application;
 - (c) whether, in the circumstances of these applications, including the bargaining units applied for, the Board should exercise its discretion under 103(3) of the Act, and if so, in what way it should do so;
 - (d) the manner in which the voting constituency(s) should be described if a representation vote(s) is to be held.
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Labour Relations Act

NOTICE TO EMPLOYEES**Posted by Order of the Ontario Labour Relations Board**

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE COMPANY AND THE UNION PARTICIPATED AND HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT THE COMPANY VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM YOU OF YOUR RIGHTS AND OBLIGATIONS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION OF THEIR OWN CHOICE;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

POVOA CARPENTRY TRIM O/R
563808 ONTARIO INC.

PER: _____
JOSE LOPEZ

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 9TH day of NOVEMBER, 19 88.

2436-87-R; 2505-87-U Sheet Metal Workers International Association, Local 30, Applicant/Complainant v. Rainscreen Metal Systems Incorporated, Respondent

Bargaining Unit - Certification - Construction Industry - Employer engaged in the retrofit of wall facings and window openings - Some employees working in shop bending flashing and fabricating other metal products destined for project - Employees not working exclusively in shop - Board finding that sheet metal shop employees commonly associated in their work with on site employees - Shop employees falling within bargaining unit description

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

APPEARANCES: *Elizabeth Mitchell*, *Jim Moffatt* and *Duane Wells* for the applicant/complainant; *Karen J. Weinstein* and *John Bierma* for the respondent.

DECISION OF THE BOARD; November 3, 1988

1. The Board has two matters before it. Board File No. 2436-87-R is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*. If necessary, the applicant seeks relief under section 8 of the Act. Board File No. 2505-87-U is a complaint under section 89 of the Act which the applicant relies upon in support of its section 8 request.

2. These matters and others initially came on for hearing on February 8, 1988, before another panel of the Board. An application under section 63 and subsection 1(4) of the Act was withdrawn at that time and the parties involved in that application withdrew from the proceeding. Although a petition had been filed, no one appeared on behalf of the objecting employees at the hearing on February 8, and the panel hearing this matter determined it would give no weight to the petition. Given these developments, the proceeding continued with only the Sheet Metal Workers International Association, Local 30 ("Local 30") as the applicant/complainant and Rainscreen Metal Systems Incorporated ("Rainscreen") as the respondent.

3. In its decision of February 16, 1988, the Board determined that the applicant is a trade union and an affiliated bargaining agent of a designated employee bargaining agency. The Board further found the following bargaining unit constitutes a unit of employees of the Rainscreen appropriate for collective bargaining:

all journeymen and apprentice sheet metal workers in the employ of the respondent Rainscreen in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice sheet metal workers in the employ of the respondent Rainscreen in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.

For purposes of clarity, the Board notes that employees working as sheeters,

sheeters' assistants and material handlers are employees in the bargaining unit.

4. In its decision of February 16, 1988, the Board appointed a Labour Relations Officer to inquire into the list of employees in the bargaining unit and report back to the Board for the purpose of enabling the Board to determine whether eleven persons were employees of Rainscreen working in the bargaining unit on the application date. Pursuant to his appointment, the Board Officer met with the parties on May 24 and on June 3 and 7, 1988, proceeded to examine ten persons. When the examination continued on June 8, 1988, the applicant called three witnesses and the respondent called one.

5. A copy of the Board Officer's Report (the "Report") was sent to each of the parties, together with a (Form 68) Notice of Report of Labour Relations Officer. Counsel for each party submitted written representations with respect to the conclusions the Board should reach in view of the Report and requested a hearing. On September 27 & 28, 1988, a hearing was conducted to entertain the representations of the parties regarding the Report. The parties were in agreement that it would be appropriate to resolve the issues raised in the Report before proceeding to address the remaining outstanding issues.

6. At the outset of the hearing on September 27, counsel for Rainscreen requested that the Board take a view of the job site that was the focus of much of the evidence contained in the Report. Counsel for Local 30 objected to the Board taking a view. After entertaining the parties' submissions on this issue and after recessing to consider the matter, the Board advised the parties orally at the hearing that it was not satisfied that this was an appropriate case for exercising its discretion in favour of taking a view.

7. At the hearing before the previous panel, the applicant challenged six persons on various grounds set out at paragraph 12 of the Board's decision dated February 16, 1988. At the beginning of her argument, counsel advised the Board that Local 30 was withdrawing its challenge to Michael Sanderson and that the basis for the challenges to the remaining five persons was narrower. Accordingly, the argument proceeded on the basis of Local 30's challenges to David Mokry, Guy Simmons, Lyman Verge, Paul Verge and Frederick Willey.

8. The Board has carefully reviewed the Report, the parties' submissions and the relevant jurisprudence. Since the parties have the Report, we do not propose to set out in detail the evidence contained therein.

9. Rainscreen is engaged in the retrofit of wall facings and window openings. The employees working for Rainscreen utilize materials such as steel, siding, coping and flashing. On the date of the application, Rainscreen had employees working at two job sites, the main one being the Strathcona Hotel. It also had employees working at its shop located at the King Sideroad in Richmond Hill.

10. Local 30 challenged D. Mokry on the basis that he did not perform work for Rainscreen on December 3, 1987. Mokry, who has been employed by Rainscreen for approximately 1½ years, indicated during his examination that he did perform work for Rainscreen at the Strathcona Hotel on December 3 falling within the bargaining unit description. He testified that he did not work a full shift that day since a company Christmas party was held that evening and all of the employees who normally worked at the Strathcona Hotel site left early. Mokry could not recall a lot of the details about his work on December 3, but this is not surprising given the timing of his examination. At least two other persons examined had some recollection of Mokry's presence on the job site that day. Although some persons examined indicated that they did not see Mokry at work that

day, we are unable to conclude from the evidence that he was not there. Mokry's time card discloses that he worked 6 hours at the Strathcona Hotel on December 3. In reviewing all of the evidence contained in the Report, the Board finds that Mokry did perform bargaining unit work for Rainscreen on December 3, 1988 and, therefore, his name is appropriately included on the list of employees.

11. The remaining four challenges are persons who perform work, although not exclusively, in Rainscreen's shop. On December 3, 1987, Paul Verge, Guy Simmons and Frederick Willey started their workday at the shop. Since he had a medical appointment, Lyman Verge did not attend at the shop on December 3 and did not intend to work on that day. Rainscreen's position and the evidence of these four individuals, which Local 30 disputed, is that these four individuals did perform work for Rainscreen falling within the bargaining unit at the Strathcona Hotel on December 3. Rainscreen maintains that it was necessary to call these persons to work at the Strathcona Hotel since the employees who would normally work a complete shift at that site on that day left the job site prior to the completion of their shift due to the Christmas party. Rainscreen also takes the position, also disputed by Local 30, that the shop employees in any event are included in the bargaining unit since they are commonly associated in their work with on-site employees.

12. Having reviewed all of the evidence contained in the Report, the Board is satisfied that the employees who work in Rainscreen's shop are commonly associated in their work with on-site employees and, therefore, they fall within the bargaining unit description. With very limited exception, the materials which are utilized by Rainscreen on its construction sites are fabricated in its shop. The majority of the work of the employees who perform work in the shop involves bending flashing and the fabrication of other metal products destined for a particular Rainscreen project. The employees who work in the shop do not do so exclusively. Although there is some dispute as to whether the shop employees worked at the Strathcona Hotel site on December 3, 1987, we are satisfied from the evidence in the Report that the employees who work in the shop frequently work on construction sites performing bargaining unit work. Guy Simmons and Frederick Willey work in the shop when the production demands in the shop require their presence and otherwise work on Rainscreen's construction sites. Paul Verge spends most of his time in the shop but he performs work on construction sites as well. Section 117(b) of the Act defines a construction employee as including "an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees". Given this definition and the facts before us, the Board finds that Paul Verge, Guy Simmons and Frederick Willey, the three persons who at least worked in the shop on December 3, were in the bargaining unit on December 3, 1987. See *Bill Brownlee Excavating Limited*, [1988] OLRB Rep. Apr. 364 and *Esam Construction Limited*, [1980] OLRB Rep. Feb. 197. Given this finding, it is unnecessary to decide whether Paul Verge, Frederick Willey and Guy Simmons worked at the Strathcona Hotel site on December 3, 1987.

13. We are left with the issues of whether Lyman Verge worked on December 3 and, if he did, whether he performed bargaining unit work. The Board has reviewed the evidence relevant to these issues and has determined that Lyman Verge did attend the Strathcona Hotel site on December 3, 1987 and that he did not work at the shop on that day. However, it is impossible from the evidence of the Report to conclude that Lyman Verge performed bargaining unit work that day. Lyman Verge had no recollection of what he did that day, nor was there any reliable evidence from other sources regarding the work, if any, that Lyman Verge performed on that day. Accordingly, the Board finds that Lyman Verge did not perform bargaining unit work for Rainscreen on the application date and, accordingly, his name should not appear on the list of employees for purposes of the count.

14. Of the six original challenges made by the applicant, the Board finds that Michael San-

derson, David Mokry, Guy Simmons, Paul Verge and Frederick Willey were employees of Rainscreen working in the bargaining unit on the application date and that Lyman Verge was not working in the bargaining unit for Rainscreen on the application date. The final resolution of the list of employees depends on the Board's determination of Local 30's section 89 complaint. The outstanding matters are scheduled to be heard by the Board on November 21, November 23, December 12, 1988 and January 16, 1989.

2477-87-R C.U.P.E., Applicant v. Governing Council of the University of Toronto, Respondent v. Group of Employees, Objectors

Practice and Procedure - Pre-Hearing Vote - During officer examinations respondent writing to Board asking for review of officers' rulings that employer could not add to the grounds of challenge or to the list of persons filed - Board not engaging in a constant process of reviewing officers' rulings - Parties had agreed on a way of proceeding - Parties now obliged to proceed on that basis - Officers directed to continue inquiry on the bases originally specified by the respondent

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *D. A. MacDonald* and *R. R. Montague*.

DECISION OF THE BOARD; November 18, 1988

1. The Board directed the taking of a pre-hearing vote in this application and further directed that the ballot box be sealed (see decision dated March 31, 1988). The dispute between the parties with respect to the composition of the parties involves approximately one-third of the proposed bargaining unit; the ballots of the persons among those challenges who voted were, of course, segregated. At the vote held on April 25, 26 and 27, 1988, nearly 2,500 persons voted, the ballots of approximately one-third of whom were segregated.

2. In its March 31st decision, the Board set out the bases upon which the respondent, the University of Toronto ("the University"), made certain of its challenges; attached as Appendix A to that decision is a complete list of the persons in dispute divided into the specific ground for the challenge. The respondent challenged over 250 persons on the basis that they are employed in a confidential capacity relating to labour relations; about 400 more people on the basis that they exercise managerial functions and/or are employed in a confidential capacity; and about 70 other persons are challenged on those bases plus a lack of community of interest basis. Thirty persons are challenged on the basis they are employed in a confidential capacity and/or do not have a community of interest with the other persons in the proposed unit *or* that they perform managerial functions and/or lack a community of interest. Only one person was challenged under the "managerial" branch of clause 1(3)(b) of the *Labour Relations Act* ("the Act"). Two persons have been categorized by the respondent as "part-time, confidential and managerial". The parties reached an agreement on how to deal with the challenges (reproduced in the Board's decision of June 15, 1988) and as a result of that agreement Labour Relations officers began examinations of certain of the persons in dispute.

3. By letter dated October 14, 1988, counsel for the University seeks two orders from the Board: the first is to require the Officers to make a full inquiry into the duties and responsibilities of persons who were cited by the University as performing managerial functions *or* as being

employed in a confidential capacity; the second is to permit the University to add to the list of challenged individuals those persons who have since the determination of the challenges been found by the University to be performing managerial duties or to be employed in a confidential capacity. The union opposes the University's request. The University also seeks an oral hearing to make submissions on its request.

4. The Officers have ruled against the University's adding to the grounds of challenge and to adding to the list of persons challenged. The University is in effect appealing the rulings of the Officers during the course of the Officers' inquiry.

5. In the normal course, the Board is not prepared to make a determination with respect to the appropriateness of an Officer's inquiry: see *Strongland Construction Ltd.*, [1987] OLRB Rep. Oct. 1330. The parties have the right to address rulings of Officers before the Board after the Officers' report has been completed (see Rule 67 of the Board's Rules of Procedure; also see Practice Note No. 4). It is inconsistent with the expeditious conduct of an Officer's inquiry to interrupt the course of that inquiry to consider parties' objections to the Officer's rulings. One possible consequence of the Board's general practice is that an inquiry might have to be re-opened after the completion of the Officer's report or that the panel of the Board hearing the case might embark upon further questioning of witnesses if it disagrees with the Officer's rulings to exclude certain questions or witnesses. When the Officer has included questions or witnesses whom the Board later determines should not have been included in the inquiry, the Board will merely ignore the inapplicable evidence. It is for the Officers to decide how to conduct the inquiry in the knowledge that their decisions may or may not be upheld by a panel of the Board. (In this regard, we note subparagraph 3 of the parties' agreement which states broadly "It is understood by the parties that this agreement in no way alters the Labour Relations Officer's authority as set out in Paragraph 4".) But, quite simply, it is not expeditious for the Board to engage in a constant process of reviewing Officers' rulings during the inquiry or in a determination of the kinds of Officers' rulings which might appropriately be reviewed and those which should not be.

6. Counsel for the University makes the following submission:

[T]his is an unusually large bargaining unit with a large number of exclusions identified by the University. The issue of the jurisdiction of the Labour Relations Officers will be fundamental in these lengthy proceedings and may affect a number of positions within the potential bargaining unit. It is submitted that resolution of this matter should occur as soon as possible rather than waiting until the Officer's report is released to argue the point at that time.

We have considered that submission very carefully; nevertheless, we are not persuaded that we should interfere with the course of the inquiry. We note, however, that the parties have agreed to the issuance of an interim report which may be subject to representations by the parties.

7. We note that in this case, the parties requested that the Board hold a hearing after the taking of the vote for the purpose of determining the procedure to be followed in dealing with the challenges and a hearing was scheduled for that purpose. Indeed it would have been desirable to hold a hearing for that purpose even had the parties not requested it, given the number of challenges involved. On the first day of that scheduled hearing, however, the parties requested a meeting with a Labour Relations Officer and arrived at the agreement referred to above. It clearly is not an exhaustive approach to dealing with the challenges and it may be that the Board would have given different directions as to how the parties were to proceed had the hearing occurred. The parties chose not to come before the panel and certainly one would think that they could and would more easily and readily adhere to an agreed-upon way of proceeding than to one which in the end might have been imposed by the Board based on what might have been opposing submissions by

the parties. But having reached the agreement, they are now obliged to proceed on that basis and, with the Officer's, to deal with whatever questions arise as a result of its incompleteness.

8. In view of our determination of this matter, we make no comment on the merits of the University's request. The Officers are directed to continue their inquiry into the challenges on the bases specified by the respondent and set out in the Board's decision of March 31st.

1614-88-R Christian Labour Association of Canada, Applicant v. West Lincoln Multilevel Health Facility Inc., Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Whether registered and graduate nurses should be excluded from all employee unit in health facility - Employer arguing for inclusion on the basis of fragmentation - Board excluding nurses - Bargaining unit proposed by applicant viable - Certificates issuing

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *J. A. Ronson* and *P. V. Grasso*.

APPEARANCES: *Ed Pypker*, *Hank Beekhuis* and *Philip V. Prins* for the applicant; *Malcolm Winter* and *Connie Tank* for the respondent; no one appearing for the objecting employees.

DECISION OF THE BOARD; November 10, 1988

1. The name of the respondent is amended to read: "West Lincoln Multilevel Health Facility Inc."

2. This is an application for certification in which the parties met with a Labour Relations Officer on the day scheduled for hearing of this matter, reached agreement on some of the matters in dispute between them and further agreed to waive their right to a formal hearing on the agreed matters. A hearing was necessary on the issue of whether registered and graduate nurses should be excluded from the bargaining unit, which was conducted on the basis of stated facts and argument.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The trade union seeks to represent a bargaining unit which excludes registered and graduate nurses. The employer seeks to include them on the principal basis that an all employee unit as granted in *King Nursing Home Ltd.*, [1987] OLRB Rep. Oct. 1257, would be appropriate. It cites what it considers to be nearly identical job duties of the Registered Nurses (R.N.'s) and Registered Nursing Assistants (R.N.A.'s), who have been agreed to be in the bargaining unit, and the potential for fragmentation of the employees into several bargaining units, with the resultant multiplicity of collective agreements to administer to support its argument that the more harmonious labour relations result would be to include registered and graduate nurses along with the agreed on R.N.A.'s.

5. The union submits that the *King Nursing Home* case, *supra*, is an anomaly based on its specific circumstances, which included the union's (CLAC's) wish to represent the R.N.'s in that circumstance. It asserts that that decision makes it clear that the standard practice of the Board is

to exclude R.N.'s and that the thrust of that decision was that the Board looked at the unit the union sought to represent to see if it was viable. It argues that the request may be different in the facts of this case, but the unit is nonetheless a viable one. The applicant stresses that there may be more than one way to describe an appropriate bargaining unit in the same workplace. Furthermore, it underlines that the R.N.A.'s work in the retirement home wing of the facility and the R.N.'s in the nursing home wing, with no interchange under normal circumstances. The R.N.'s themselves, it is asserted, do not wish to be represented by the applicant as they feel they have no community of interest with a non-professional bargaining unit.

6. We ruled orally at the hearing of this matter that we would accept the applicant's request for the following reasons:

The standard practice of the Board is to include R.N.A.'s with service bargaining units but not to include R.N.'s and graduate nurses. The circumstances and facts applicable in the *King Nursing Home* case are not present here. The union has asked for a bargaining unit, which is viable, according to Board practice, and therefore we grant the request.

For the sake of argument on this issue we accepted the employer's statements concerning the several categories of duties which are the same, but that an R.N.A. cannot take orders over the phone. We also note the statutory requirement that R.N.'s be available for the nursing home wing which does not apply to the retirement home wing. We are not persuaded that these circumstances indicate any lack of viability in the proposed unit. In particular we do not find that the standard unit will lead to undue fragmentation.

7. In light of our oral ruling, and having regard to the agreement of the parties on other aspects of the bargaining unit, the Board finds that:

Bargaining Unit #1

all employees of the respondent at Grimsby, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week; and

Bargaining Unit #2

all employees of the respondent at Grimsby regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff,

constitute units of employees of the respondent appropriate for collective bargaining.

8. The Board is satisfied on the basis of all of the evidence before it that more than fifty per cent of the employees of the respondent in each bargaining unit, at the time the application was made, were members of the applicant on October 17, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. Certificates will issue to the applicant with respect to bargaining units #1 and #2.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1295-85-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Hamilton Yellow Cab Company Limited, Fleet Taxi, Yellow Taxi, Transportation Unlimited Inc., D.J. Van Boort, R. Cruden, R. Maurice, J. Lynch, B. Greenland, M. Ferguson, R. Geer, E. Grasley, V. Sudhir, A. Dicasa, P. Dicasa, R. Deacons, R. Botton, F. Mattioli, W. Bray, J.R. McNally, R. Kaur, G. Seliga, W. T. Vanderheyden and Peter Quesnelle, (Respondents)

Unit #1: "all dependent contractors of the respondent in the City of Hamilton who are operating as single plate owner operators including those operators who lease a taxi cab plate, save and except supervisors, garage, office and dispatch staff, multi-car or plate operators, and persons above the rank of supervisor" (160 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all drivers within the taxi cab system of the respondent in the City of Hamilton who drive a taxi cab either on a commission or leased-shift basis, or for wages, save and except supervisors, garage, office and dispatch staff and persons above the rank of supervisor"(160 employees in unit) (*Having regard to the agreement of the parties*)

2129-86-R: Ontario Nurses' Association (Applicant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent)

Unit: "all registered and graduate nurses employed by Sudbury General Hospital of the Immaculate Heart of Mary at the Killarney Health Centre, Killarney, Ontario save and except the assistant director of nurses and persons above the rank of assistant director of nurse"(2 employees in unit)

1361-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. J. Sousa Contractor Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers employed by the respondent in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (29 employees in unit)

2845-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. Ottawa Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in Ottawa, save and except those employees teaching in schools pursuant to Part XI of the *Education Act* and those persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (322 employees in unit) (*Clarity Note*)

2869-87-R: United Steelworkers of America (Applicant) v. Raypak Thermonics (Canada) Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen,

persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period" (22 employees in unit) (*Having regard to the agreement of the parties*)

2974-87-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Peter Kiewit Sons Company of Canada Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. United Brotherhood of Carpenters and Joiners of America, Local 38 (Intervener #2)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman" (28 employees in unit)

3034-87-R: Labourers' International Union of North America, Local 527 (Applicant) v. L.L.C. General Contractors Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers in the employ of the respondent in the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

0271-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW - Canada) (Applicant) v. Ornamental Moulding Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Waterloo, save and except supervisors, those above the rank of supervisor, office and sales staff and students employed during the school vacation period or as part of a work experience program" (63 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0477-88-R: Wilfrid Laurier University Faculty Association (Applicant) v. Wilfrid Laurier University (Respondent) v. Group of Employees (Objectors)

Unit: "all full-time faculty and professional librarians employed by the respondent in the Regional Municipality of Waterloo, save and except the President, Vice-Presidents, Deans, Director of Computing Services and the University Librarian and Archivist" (255 employees in unit)

0531-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gaston H. Poulin Contractor Limited (Respondent)

Unit: "all employees of the respondent in the District of Temiskaming excluding Board Areas #19 & #20, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, employees engaged in survey work and labourers, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (22 employees in unit)

0784-88-R: Canadian Union of Public Employees (Applicant) v. Therapeutic & Educational Living Centres Inc. (Respondent)

Unit #1: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton save and except Residence Manager, persons above the rank of Residence Manager, secretary, bookkeeper, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit)

Unit #2: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton regularly employed for not more than 24 hours per week save and except Residence Manager, persons above the rank of Residence Manager, secretary, and bookkeeper" (10 employees in unit)

0972-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Lemiro Inc. (Respondent)

Unit: “all employees of the respondent in the Township of Halloway and the Townships adjacent thereto employed in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1016-88-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Theo Vanderberk Constr. Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in the County of Lambton and the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

1040-88-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (AFL:CIO:CLC) (Applicant) v. Chancellor, Masters and Scholars of the University of Oxford (Respondent)

Unit: “all employees of the respondent at its Oxford University Press Canada Division in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, mailroom staff and maintenance staff and students employed during the school vacation period” (15 employees in unit) (*Having regard to the agreement of the parties*)

1065-88-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Farry Excavating & Grading Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham employed as Teamsters engaged in on-site construction, save and except non-working foreman, and persons covered by the subsisting collective agreement between the respondent and the International Union of Operating Engineers, Local 793” (13 employees in unit)

1128-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Mann Ten Company Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1181-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Stephenson Cafeteria of Canada Inc. (Canada)

Unit: “all employees of the respondent in the City of Chatham regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and office and clerical staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

1216-88-R: IWA-Canada (Applicant) v. Kakabeka Timber Limited (Respondent)

Unit: "all employees of the respondent in the Township of O'Connor save and except supervisors, foremen, those above the rank of supervisor or foreman and office and clerical staff" (35 employees in unit) (*Having regard to the agreement of the parties*)

1217-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Sturgeon Falls Brush Spraying and Cutting Limited (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, construction labourers and truck drivers employed by the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the County of Simcoe and the District Municipality of Muskoka and in the Townships of Armour, Perry, Chaffey, Strong, Machar, Laurier and Sough Himsworth and in the Townships adjacent thereto, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1246-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Royal Pine Homes (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1287-88-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Public Utilities Commission of the Town of Campbellford (Respondent)

Unit: "all office employees of the respondent at Campbellford, Ontario save and except the office manager, persons above the rank of office manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

1295-88-R: International Union of Operating Engineers Local 973 (Applicant) v. On Grade Excavating and Drainage (Niagara) Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1307-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Multitech Warehouse District (Ontario) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in London, save and except store manager and persons above the rank of store manager" (11 employees in unit) (*Having regard to the agreement of the parties*)

1325-88-R: International Association of Machinists and Aerospace Workers (Applicant) v. Dominion General Manufacturing Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto and the City of Mississauga, save and except Foremen/Supervisors, persons above the rank of Foreman/Supervisor, office and sales staff and students employed during the school vacation period" (150 employees in unit) (*Having regard to the agreement of the parties*)

1342-88-R: United Steelworkers of America (Applicant) v. Intermetco Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Welland, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, and students employed during the school vacation period” (22 employees in unit)

1357-88-R: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Applicant) v. Royal Homes Limited (Respondent) v. IWA - Canada (Intervener #1) v. Group of Employees (Intervener #2)

Unit: “all employees of the respondent in Wingham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff” (175 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1360-88-R: The Employees Association of St. Lawrence and District Ambulance Services (Applicant) v. 520212 Ontario Ltd. o/a St. Lawrence & District Ambulance Services (Respondent)

Unit: “all employees of the respondent in the Township of Osgoode save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week” (3 employees in unit) (*Having regard to the agreement of the parties*)

1366-88-R: United Steelworkers of America (Applicant) v. National Picture & Frame Ltd. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (15 employees in unit) (*Having regard to the agreement of the parties*)

1370-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Semac Industries Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of Brantford, save and except forepersons, persons above the rank of foreperson, office and clerical staff, salesperson, and dependent contractors” (28 employees in unit) (*Having regard to the agreement of the parties*)

1374-88-R: Energy and Chemical Workers Union (Applicant) v. Desmarais & Frère Ltée (Respondent)

Unit: “all employees of the respondent at its Enterprise Desmarais Forever Enterprise Division in the City of Ottawa save and except supervisors, persons above the rank of supervisor, office and sales staff” (54 employees in unit) (*Having regard to the agreement of the parties*)

1379-88-R: Ironworkers District Council of Ontario (Applicant) v. Lakeside Contracting Co. Ltd. (Respondent)

Unit: “all rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all rodmen in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1386-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Southern Express Lines of Ontario Ltd. (Respondent)

Unit: “all employees of the respondent in Metropolitan Toronto save and except supervisors, those above the rank of supervisor, mechanics, dispatchers, brokers, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

1413-88-R: United Food & Commercial Workers International Union (Applicant) v. Maple Leaf Petroleum Limited c.o.b. as Mr. Lube (Respondent)

Unit #1: "all employees of the respondent in the City of Oshawa, save and except manager, persons above the rank of manager, persons employed for not more than 24 hours per week, and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Oshawa regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except manager and persons above the rank of manager" (5 employees in unit) (*Having regard to the agreement of the parties*)

1420-88-R: Textile Processors, Service Trades, Health Care Professionals & Technical Employees International Union, Local 351 (Applicant) v. Canadian Linen Supply Co. Ltd. c.o.b. as Metro Industrial Linen Supply (Respondent)

Unit: "all employees of the respondent in the City of Oakville, save and except supervisors, persons above the rank of supervisor, office and sales staff, drivers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*)

1421-88-R: Canadian Trailer Workers' Association (Applicant) v. Custom Trailer Manufacturing Ltd. (Respondent)

Unit: "all employees of the respondent at Ajax, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff" (24 employees in unit) (*Having regard to the agreement of the parties*)

1425-88-R: Service Employees Union, Local 210 Affiliated with Service Employees International Union AFL-CIO:CLC (Applicant) v. Livingston International Inc. (Respondent)

Unit: "all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (71 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1426-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. VS Services Ltd. (Respondent)

Unit: "all employees of the respondent at Motor Wheel Corporation of Canada, in the City of Chatham, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

1427-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. L.P.S. Excavating & Grading 720419 Ontario Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1428-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Arro Sewer & Watermain Inc. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and

Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1440-88-R: Ontario Nurses’ Association (Applicant) v. The Glebe Centre Inc. (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in the City of Ottawa, save and except the Director of Nursing and persons above the rank of Director of Nursing” (8 employees in unit) (*Having regard to the agreement of the parties*)

1442-88-R: United Steelworkers of America (Applicant) v. Almac Industries Inc. c.o.b. Almac Felt & Sisal Manufacturing Co. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (43 employees in unit) (*Having regard to the agreement of the parties*)

1448-88-R: Canadian Union of Public Employees (Applicant) v. 749527 Ontario Limited operating as Manitoulin Ambulance Service (Respondent)

Unit #1: “all employees of the respondent in the Town of Little Current, save and except supervisors, persons above the rank of supervisor, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the Town of Little Current regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical employees” (9 employees in unit) (*Having regard to the agreement of the parties*)

1456-88-R: Christian Labour Association of Canada (Applicant) v. Slimline Pipe Inc. (Respondent)

Unit: “all employees of the respondent in the Town of Pickering, save and except foremen, persons above the rank of foreman, office and sales staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

1480-88-R: Canadian Union of Public Employees (Applicant) v. Carleton Place & District Memorial Hospital (Respondent) v. Group of Employees (Objectors)

Unit: “all office and clerical employees of the respondent in Carleton Place save and except supervisors, persons above the rank of supervisor, secretary to the chief Executive Officer, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and those persons for whom any trade union held bargaining rights as of September 19, 1988” (8 employees in unit) (*Having regard to the agreement of the parties*)

1486-88-R: Service Employees’ International Union, Local 183 (Applicant) v. The Quinte Hearing Handicapped Community Services Association Inc. (Respondent)

Unit: “all employees of the respondent in the City of Belleville, save and except supervisors, persons above the rank of supervisor” (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1487-88-R: Labourers’ International Union of North America (Applicant) v. Westbound Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Mun-

icipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1499-88-R: Ontario Nurses’ Association (Applicant) v. Steeves and Rozema Enterprises Ltd. c.o.b. Trillium Villa Nursing Home (Respondent)

Unit #1: “all registered nurses employed in a nursing capacity by the respondent in the Town of Clearwater, Ontario, save and except Director of Resident Care, persons above the rank of Director of Resident Care, and persons regularly employed for not more than 24 hours per week” (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all registered nurses employed in a nursing capacity regularly employed for not more than 24 hours per week by the respondent in the Town of Clearwater, Ontario, save and except Director of Resident Care and persons above the rank of Director of Resident Care” (5 employees in unit)(*Having regard to the agreement of the parties*)

1521-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC v. Michael Food Marts Ltd. c.o.b. Poulton’s Valu-Mart and Abbie’s Convenience Store (Respondent)

Unit: “all employees of the respondent in the Town of Walden, save and except assistant store manager, persons above the rank of assistant store manager and office staff” (71 employees in unit) (*Having regard to the agreement of the parties*)

1539-88-R: International Union of Operating Engineers & General Workers, Local 793 (Applicant) v. R.M. Belanger Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Townships of O’Brien, Williamson, Teitzel, Burney, Fauquier, Nanson, Swenson, Sulman and Owens, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

1554-88-R: Ontario Nurses’ Association (Applicant) v. Lanwell Property Management Ltd. c.o.b. as St. Charles Village (Respondent)

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent in the City of Welland, save and except the supervisors, persons above the rank of supervisor and those persons regularly employed for not more than 24 hours per week” (3 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent in the City of Welland, regularly employed for not more than 24 hours per week” (4 employees in unit) (*Having regard to the agreement of the parties*)

1564-88-R: Ontario Nurses’ Association (Applicant) v. Extendicare Health Services Inc. (Respondent)

Unit: “all registered and graduate nurses employed by the respondent in a nursing capacity in the Town of Kapuskasing, save and except the Administrator and persons above the rank of Administrator” (5 employees in unit)

1584-88-R: United Steelworkers of America (Applicant) v. McKerlie-Millen Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in its A.W.L. Steego Division at 270 South Service Road, Stoney Creek, save and except forepersons and persons above the rank of foreperson, office and sales staff, persons

regularly employed for not more than 24 hours per week and students employed during the school vacation period” (31 employees in unit) (*Having regard to the agreement of the parties*)

1597-88-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. D.S.I. Dywidag Systems International Canada Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman” (11 employees in unit)

1624-88-R: International Brotherhood of Painters & Allied Trades, Local 1819 - Glaziers (Applicant) v. Pioneer Storefronts & Skylites Ltd. (Respondent)

Unit: “all glaziers and glaziers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers’ apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

3112-87-R: Ontario Catholic Occasional Teachers’ Association (Applicant) v. Frontenac-Lennox and Addington County Roman Catholic Separate School Board (Respondent)

Unit: “all occasional teachers of the respondent in the Counties of Frontenac, Lennox and Addington” (88 employees in unit)

Number of names of persons on revised voters’ list	83
Number of persons who cast ballots	30
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	7
Ballots segregated and not counted	2

0572-88-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Durham Board of Education (Respondent)

Unit: “all occasional teachers employed by the respondent in its secondary panel in the Durham Region save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined by the *School Boards and Teachers Collective Negotiating Act*” (266 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	252
Number of persons who cast ballots	41
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters’ list	39
Number of segregated ballots cast by persons whose names appear on voters’ list	2
Number of ballots marked in favour of applicant	38
Number of ballots marked against applicant	3

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1154-88-R: R & R Trucking Employees (Applicant) v. R & R International Transportation Systems (Respondent)

Unit: “all employees of the employer working in and out of the City of Port Colborne, save and except fore-

men, persons above the rank of foreman, office and sales staff engaged in the operation of the employer's trucks" (19 employees in unit)

Number of names of persons on list as originally prepared by employer	22
Number of persons who cast ballots	21
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	20
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of intervener	8
Ballots segregated and not counted	1

1212-88-R: The Ottawa Typographical Union, Local 102 (Applicant) v. York Advertising Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	23
Number of persons who cast ballots	24
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	23
Number of segregated ballots cast by persons whose names appear on voters' list	23
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	10
Ballots segregated and not counted	1

1306-88-R: United Brotherhood of Carpenters & Joiners of America, Local 2679 (Applicant) v. Premdor Inc. (Respondent)

Unit: "all employees of the respondent in the City of Brampton save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	5
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	5
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1

Applications for Certification Dismissed Without Vote

1489-84-R: Teamsters Local No. 352, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. McDonnell-Ronald Limousine Service Limited, o/a Airline Limousine (Respondent) (355 employees in unit)

1490-84-R: Teamsters Local No. 352, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Aéroport Limousine Services Ltd. and McIntosh Limousine Services Ltd. (Respondents) (139 employees in unit)

1491-84-R: Teamsters Local No. 352, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Airlift Limousine Service Ltd. (Respondent) (104 employees in unit)

1492-84-R: Teamsters Local No. 352, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Air Cab Limousine Services (1985) Ltd. (Respondent) v. Group of Employees (Objectors) (169 employees in unit)

1549-84-R: Teamsters Local No. 352, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Airlift Limousine Service Ltd. (Respondent) (126 employees in unit)

0631-87-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Dunmark Electric (Ancaster) Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 105 (Intervener) v. Group of Employees (Objectors) (15 employees in unit)

3182-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. T.R.A.C. Construction Limited (Respondent) (7 employees in unit)

1129-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Canex Wood-working Inc. (Respondent) (3 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0700-88-R Ontario Secondary School Teachers' Federation (Applicant) v. The Wentworth County Board of Education (Respondent) v. Ontario Public School Teachers Federation (Intervener)

Unit: "all occasional teachers employed by the respondent in its elementary panel in Wentworth County save and except persons who when they are employed as substitutes for other teachers are teachers as defined in the School Boards and *Teachers Collective Negotiations Act*" (207 employees in unit)(*Having regard to the agreement of the parties*) (*Clarity Note*)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1797-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bill Brownlee Excavating Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining the same, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	7
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	7
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	7

1015-88-R: Canadian Union of Operating Engineers & General Workers, Local 111 (Applicant) v. Diamond Taxi (Ottawa) Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Ottawa employed as call takers, dispatchers, and telephone operators, save and except supervisors and persons above the rank of supervisor" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	5

1235-88-R: United Plant Guard Workers of America, Amalgamated Plant Guards Local 1962 (Applicant) v. Burns International Security Services Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all security guards in the employ of the respondent at or out of the City of Peterborough regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except guard inspectors, persons above the rank of guard inspectors, office, clerical and sales staff" (50 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	31
Number of persons who cast ballots	18
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	18
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	10

1250-88-R: Amalgamated Clothing & Textile Workers Union - Toronto Joint Board (Applicant) v. Barmish Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Napanee, save and except supervisors, persons above the rank of supervisor, job trainers, industrial engineer, cycle checker, designers, truck drivers, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (126 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	122
Number of persons who cast ballots	112
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	112
Number of ballots marked in favour of applicant	53
Number of ballots marked against applicant	59

Applications for Certification Withdrawn

2282-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. O.P.M. Development Management Ltd. (Respondent)

0842-88-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 (Applicant) v. Collingwood Plumbing Ltd. (Respondent) v. Group of Employees (Objectors)

1238-88-R: IWA - Canada (Applicant) v. Allwood Product Ltd. (Respondent)

1253-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Frattaroli Plumbing & Heating Ltd. (Respondent)

1255-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Herbie's Drug Warehouse Limited (Respondent) v. Group of Employees (Objectors)

1266-88-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Nicholls-Radtke & Associates Ltd. (Respondent)

1368-88-R: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Victoria Hospital Corporation (Respondent)

1457-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gamble Bus & Construction Co. Ltd. (Respondent)

1464-88-R: Office & Clerical Employees of the Township of Norwich (Applicant) v. Canadian Union of Public Employees (Respondent)

1470-88-R: International Brotherhood of Painters and Allied Trades - Local 1891 (Applicant) v. Elizabeth Hughes Millwork Manufacturing Ltd. (Respondent)

1540-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation 469 (Respondent)

1613-88-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Dunmark Electric (Ancaster) Ltd. (Respondent)

1644-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Sutherland Schultz Ltd. (Respondent)

1707-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Costa Concrete & Drain (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1874-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Square One Carpentry Inc. (Respondent) (*Dismissed*)

3496-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC Local 414 (Applicant) v. 1) Ron's Mini-Super-Mart 2) Willett Foods Inc. (Respondents) (*Withdrawn*)

0039-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Black & McDonald Ltd., Black & McDonald Mechanical Ltd., Naylor Group Incorporated, Naylor Group Incorporated c.o.b. as Naylor Mechanical, Naylor Group Incorporated c.o.b. as Naylor Heating & Air Conditioning Services (Respondents) (*Withdrawn*)

0162-88-R: United Food & Commercial Workers International Union Locals 175 & Local 633 (Applicant) v. Miracle Food Mart, Steinberg Inc. & Photo Plus Inc. (Respondents) (*Withdrawn*)

0330-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Ian Somerville Construction Ltd., Robert Ian Somerville, c.o.b. as Somerville Construction Management and 671860 Ontario Inc. c.o.b. as Somerville Construction (Respondents) (*Granted*)

0363-88-R: District Council of the International Ladies' Garment Workers' Union and Locals 14, 83 and 92 (Applicant) v. New Heights Manufacturing Ltd. & 698300 Ontario Ltd. (Respondent) (*Granted*)

1148-88-R: John, John Transportation Services Inc. c.o.b. Can Am Services (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and M.G. John and Sons Limited c.o.b. United Truck Rentals (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3123-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Square One Carpentry & Square One Carpentry Inc. (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 27 (Intervener) (*Granted*)

3238-87-R: Teamsters Local No. 230, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Pavage et Betonniere St-Eustache Ltee (c.o.b. as Mathers Concrete) (Respondent) (*Withdrawn*)

0039-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Black & McDonald Limited, Black & McDonald Mechani-

cal Limited, Naylor Group Incorporated, Naylor Group Incorporated c.o.b. as Naylor Mechanical, Naylor Group Incorporated c.o.b. as Naylor Heating & Air Conditioning Services (Respondents) (*Withdrawn*)

0330-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Ian Somerville Construction Ltd., Robert Ian Somerville, c.o.b. as Somerville Construction Management & 671860 Ontario Inc. c.o.b. as Somerville Construction (Respondents) (*Granted*)

0363-88-R: District Council of the International Ladies' Garment Workers' Union & Locals 14, 83 & 92 (Applicant) v. New Heights Manufacturing Ltd. & 698300 Ontario Ltd. (Respondent) (*Granted*)

0940-88-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada Local 303 (Applicant) v. Hamilton Film Enterprises (Respondent) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

2636-87-R: International Brotherhood of Electrical Workers, Local 594 (Applicant) v. International Brotherhood of Electrical Workers, Local 586 and Ken J. Woods (Respondents) v. J.S.H. Mueller Ltd., Electrical Trade Bargaining Agency and Electrical Contractors Association of Ontario (Interveners) (*Dismissed*)

0158-88-R: Hamilton Automatic Vending Co. Ltd. (Applicant) v. Cement, Lime, Gypsum & Allied Workers Divisions of the International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers and Helpers, Local 576D (Respondent) (*Dismissed*)

0883-88-R: Ontario Public Service Employees Union (Applicant) v. The Dufferin County Board of Education (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3275-87-R: Rick Banninga (Applicant) v. Sheet Metal Workers' International Association, Local 538 (Respondent) v. Imperial Insulation & Roofing (1982) Ltd. (Intervener)

Unit: "all employees of Imperial Insulation & Roofing (1982) Ltd. covered by the terms and conditions of the provincial collective agreement in the ICI sector of the Construction Industry relating to roofing work" (7 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	12
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	12
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	8

0219-88-R: Ronald S. Prescott (Applicant) v. Upholstery and Allied Industries Division, United Steel Workers of America, Local 49U (Respondent) v. Nesting Furniture Ltd. (Intervener) (10 employees in unit) (*Dismissed*)

0246-88-R: Dwade Lavallie on his own behalf and on behalf of a group of employees of Markus Construction Ltd., (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 93; Ontario Provincial District Council of the United Brotherhood of Carpenters and Joiners, the Carpenters District Council of Toronto and the Vicinity, the Lake Ontario District Council, the Western Ontario District Council, the Ontario Acoustical & Drywall District Council, the United Brotherhood of Carpenters and Joiners of America; and Locals: 18, 27, 38, 249, 397, 446, 494, 572, 675, 785, 1071, 1256, 1316, 1450, 1669, 1946, 1988, 2041, 2050, 2222, 2451, 2486 & 2965 of the United Brotherhood of Carpenters & Joiners of America (Respondents) v. 688996 Ontario Inc. c.o.b. as Markus Construction (Pembroke) (Intervener) (12 employees in unit) (*Withdrawn*)

0311-88-R: Brian Masse (Applicant) v. The Built-Up Roofers, Damp & Waterproofing Section of the Ontario Sheet Metal Workers' Conference of the Sheet Metal Workers' International Association, & Sheet Metal Workers' International Association Local 47 (Respondent) v. M & Al Roofing Ltd. (Intervener) (28 employees in unit) (*Withdrawn*)

0452-88-R: Lakehead Regional Family Centre (Applicant) v. Ontario Public Service Employees Union (OPSEU) & Canadian Union of Public Employees (CUPE) (Respondents)

Unit: "all employees of the applicant in the District of Thunder Bay, save and except supervisor, persons above the rank of supervisor, professional medical staff, house supervisor, executive secretary to the Executive Director, Executive Secretary to the Director - Management Services and the Director Programs and Services, Financial Assistant, Purchasing Assistant, Payroll Assistant, Staff Training Co-ordinator" (95 employees in unit) (*Clarity Note*) (*Granted*)

Number of names of persons on revised voters' list	95
Number of persons who cast ballots	96
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	93
Number of segregated ballots cast by persons whose names appear on voters' list	3
Number of ballots marked in favour of Canadian Union of Public Employees (CUPE)	142
Number of ballots marked in favour of Ontario Public Service Employees Union (OPSEU)	51
Ballots segregated and not counted	3

0472-88-R: Dan Jeanes (Applicant) v. Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. McBride's Delivery Ltd. (Intervener)

Unit: "all employees of McBride's Delivery Ltd. in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, brokers, office, clerical and sales staff" (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	6
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	6

0987-88-R: Jennifer Smith (Applicant) v. United Food & Commercial Workers Union Local 175633 (Respondent) v. S.S. Kresge Co. (A Division of K Mart Canada Ltd.) (Intervener)

Unit: "all employees of the intervener employed at its S.S. Kresge Store at 250 Red River Road in the City of Thunder Bay, Ontario, save and except food department manager, assistant store manager, store manager and persons above the rank of store manager" (19 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	18
Number of persons who cast ballots	17
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	17
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	11

1093-88-R: Joey Gagnier (Applicant) v. Pattern and Model Makers' Association of Warren and Vicinity (A.F.L. - C.I.O.) affiliated with the Pattern Makers' League of North America (Respondent) v. Atlas Pattern Works Limited (Intervener)

Unit: "the hourly rated wood, metal, plastic and plaster pattern and model makers, fixture builders, plastic layup men/women and apprentices of the respondent" (12 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	9

1195-88-R: Burt Clark (Applicant) v. Energy & Chemical Workers Union, Local 58 (Respondent) v. Canadianoxy Chemicals Ltd., Fort Erie Plant (Intervener)

Unit: "all employees of Canadianoxy Chemicals Ltd. in Fort Erie, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (25 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	25
Number of persons who cast ballots	24
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	22
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	13
Ballots segregated and not counted	2

1228-88-R: Eugene Deseire Solomon (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC Local 431, Elliot Lake (Respondent) (36 employees in unit) (*Withdrawn*)

1344-88-R: Musse Hussein et al (Applicant) v. United Steelworkers of America Local 9033 (Respondent) v. H.B. Fuller Canada Inc. (Intervener) (10 employees in unit) (*Granted*)

1345-88-R: Janet Piper (Applicant) v. Service Employees International Union Local 532 (Respondent) v. Flamboro Downs Holdings Ltd. (Intervener) (2 employees in unit) (*Granted*)

1511-88-R: Manitoulin Health Centre (Applicant) v. Ontario Public Service Employees Union (Respondent) (1 employee in unit) (*Withdrawn*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

0616-87-M: Square One Carpentry Inc. (Employer) v. United Brotherhood of Carpenters & Joiners of America, Local 27, (Trade Union) v. Labourers' International Union of North America, Local 183 (Trade Union) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1781-88-U: Humpty Dumpty Foods Ltd. (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 & the respondents listed on Schedule A (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2268-86-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Labourers' International Union of North America, Local 183 and Square One Carpentry Inc. (Respondents) (*Dismissed*)

0181-87-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Saco Fisheries Ltd. (Respondent) (*Granted*)

0381-87-U: Masonry Contractors' Association of Toronto Inc. (Complainant) v. The Bricklayers, Masons Independent Union of Canada, Local 1 (Respondent) (*Withdrawn*)

0523-87-U: Bricklayers, Masons Independent Union of Canada, Local 1 (Complainant) v. Masonry Contractors' Association of Toronto Inc., on behalf of its constituent members (Respondents) (*Withdrawn*)

1562-87-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. J. Sousa Contractor Ltd. (Respondent) (*Granted*)

2866-87-U: Ontario Nurses' Association (Complainant) v. Douglas Memorial Hospital (Respondent) (*Granted*)

2990-87-U: United Steelworkers of America (Complainant) v. Raypak Thermonics (Canada) Ltd. (Respondent) (*Dismissed*)

3140-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Complainant) v. Brunner Fleet Products Inc. (Respondent) (*Granted*)

3502-87-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800, Bill Gibson and Mario Begeron (Complainants) v. Gorf Contracting Ltd. (Respondent) (*Withdrawn*)

0134-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Loblaws Company Ltd.; Willett Foods Inc.; Ron's Mini-Super-Mart (Respondents) (*Withdrawn*)

0159-88-U: Gorf Contracting Ltd. (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Respondent) (*Withdrawn*)

0339-88-U: John Blodgett (Complainant) v. Teamsters Union, Local 938 (Respondent) (*Withdrawn*)

0450-88-U: Scott Larkin (Complainant) v. Canadian Auto Workers, Local 1136 (Respondent) (*Dismissed*)

0593-88-U: Ontario Public Service Employees Union (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

0650-88-U: Canadian Paperworkers Union, Local 37 and Raymond Sequin (Complainant) v. Waferboard Corporation and Ronald Mallette (Respondent) (*Withdrawn*)

0729-88-U: Hamilton Automatic Vending Company Ltd. (Complainant) v. Cement, Lime, Gypsum & Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, and its Local 576 (Respondent) (*Withdrawn*)

0731-88-U: Ontario Liquor Boards Employees' Union, (Complainant) v. Thousand Island Tax/Duty Free Store Ltd. (Respondent) (*Withdrawn*)

0750-88-U: Milan Miodrag (Complainant) v. International Association of Machinists, Lodge #2243, and Mack Canada Inc. (Respondents) (*Dismissed*)

0758-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Aboutown Taxi and Richard Coburn, Steve Smith & James Donnelly (Respondents) (*Withdrawn*)

0841-88-U: Labourers' International Union of North America, Local 527 (Complainant) v. Railtech Ltd. (Respondent) (*Withdrawn*)

0864-88-U: Ontario Public Service Employees Union (Complainant) v. The Geneva Centre for Autism, Communications & Language Disorders (Respondent) (*Withdrawn*)

0878-88-U: Labourers' International Union of North America, Local 183 (Complainant) v. Fairfield Management Ltd. and Creson Investments Ltd. (Respondents) (*Withdrawn*)

0881-88-U: International Brotherhood of Painters & Allied Trades, Local 1824 (Complainant) v. Allied Painting Contractors (Respondent) (*Withdrawn*)

0894-88-U: Waferboard Corporation Ltd. and Renald Malette (Complainants) v. Canadian Paperworkers Union, Local 37 and Raymond Seguin (Respondents) (*Withdrawn*)

0915-88-U: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Complainant) v. K/W Hospital (Respondent) (*Withdrawn*)

0965-88-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Complainant) v. Norman C. Bankley, JNB Plumbing & Heating and Bankley Plumbing & Heating Ltd. (Respondents) (*Granted*)

1025-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. U-Need-A Cab Ltd. and Mr. Fayad Mohammed Hamzeh and Mr. Fayez Hasan (Respondents) (*Withdrawn*)

1101-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Complainant) v. Griffith Laboratories Ltd. (Respondent) (*Withdrawn*)

1133-88-U: Retail, Wholesale & Department Store Union (Complainant) v. Ottawa Towing Service Ltd. (Respondent) (*Withdrawn*)

1166-88-U: Keeprite Worker's Independent Union (Complainant) v. Keeprite Inc. (Respondent) (*Withdrawn*)

1168-88-U: Labourers' International Union of North America, Local 837 (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 18 & William Veitch (Respondents) (*Withdrawn*)

1184-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Colonial Furniture (Ottawa) Ltd. (Respondent) (*Withdrawn*)

1188-88-U: Canadian Textile & Chemical Union (Complainant) v. Nucleus Housing Inc. (Respondent) (*Withdrawn*)

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1256-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Herbie's Drug Warehouse Ltd., Leanne Cornish, Kim Benturm, Marie Turnbull, Kathy Frost, Cindy Harthan, Francis Bird, Terry Connelly (Respondents) (*Withdrawn*)

1286-88-U: United Plant Guard Workers of America, Local 1962, Oshawa North Plant (Complainant) v. General Motors of Canada Ltd., Oshawa, Ontario (Respondent) (*Withdrawn*)

1304-88-U: IWA - Canada (Complainant) v. Allwood Product Ltd. (Respondent) (*Withdrawn*)

1312-88-U: Minerva Hadden (Complainant) v. Lino Toscani, Acting Plant Chairman (Respondent) (*Withdrawn*)

1343-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. U-Need-A Cab Ltd. and K & P Taxis Ltd. (Respondents) (*Withdrawn*)

1346-88-U: John Faulds (Complainant) v. National Automobile Aerospace & Agricultural Implement Workers Union (C.A.W., Local 1285) & Hudson-Bay Diecasting Ltd. (Respondents) (*Withdrawn*)

1405-88-U: Robert Bruce (Complainant) v. Teamsters Union, Local 230 (Respondent) (*Withdrawn*)

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1518-88-U: Clarkson Construction Company Ltd. (Complainant) v. International Brotherhood of Carpenters & Joiners of America, Local 249, Angus Froats, Sheet Metal Workers' International Association, Local 269, Kingston Building Trades Council, Fred Bailey, John Grills, Gerald Horton, Gregory Eadon, Ed Soucie, Kenneth Laird, Grant Levy, Arthur Geneau, Allan Sotkes, Samuel C. Sallans, Ken Kaddatz and Leo Laval-lee (Respondents) (*Withdrawn*)

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1531-88-U: Aaroport Limousine Service Ltd. & Others (Complainants) v. Mr. Vijay Kalhan & Teamsters, Local 352 and Teamsters, Local 938 (Respondents) (*Dismissed*)

1542-88-U: Tracy Lester (Complainant) v. The Corporation of the Township of Warwick (Respondent) (*Dismissed*)

1551-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Semac Industries Ltd. & Ruth Ivory (Respondents) (*Withdrawn*)

1562-87-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. J. Sousa Contractor Ltd. (Respondent) (*Granted*)

1601-88-U: J. R. Vaillancourt (Complainant) v. Service Employees Union, Local 183 (Respondent) (*Withdrawn*)

1602-88-U: Hamilton Automatic Vending Company Ltd. (Complainant) v. Cement, Lime, Gypsum & Allied Workers Division of the International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers & Helpers, & its Local 576 (Respondent) (*Dismissed*)

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1671-88-U: Ronald J. Hines (Complainant) v. The Regional Municipality of Hamilton-Wentworth (Respondent) (*Dismissed*)

1692-88-U: Sayde Rahi (Complainant) v. Mike Mooney/Foreman, Canadian Linen Supply (Respondent) (*Dismissed*)

1760-88-U: Nicolas Evonic (Complainant) v. Canada Post Corporation (Respondent) (*Dismissed*)

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1394-88-M: Sharon Maier (Applicant) v. Ontario Nurses Association (Respondent Trade Union) v. Carleton Place & District Memorial Hospital (Respondent Employer) (*Withdrawn*)

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1415-88-M: Versa-Care Ltd. and Brierwood Health Care Partnership (Employer) v. Christian Labour Association of Canada (Trade Union) (*Granted*)

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0183-87-JD: Canadian Paperworkers' Union Local 89 (Complainant) v. Spruce Falls Power & Paper Company Ltd. & Kimberly-Clark of Canada Ltd. & International Brotherhood of Electrical Workers, Local 1149 (Respondents) (*Withdrawn*)

0732-87-JD: Canadian Paperworkers' Union, Local 89 (Complainant) v. Spruce Falls Power & Paper Company Ltd. & Kimberly-Clark of Canada & International Brotherhood of Electrical Workers, Local 1149 (Respondents) (*Withdrawn*)

3131-87-JD: The Electrical Power Systems Construction Association & Ontario Hydro (Applicant) v. Ontario Allied Construction Trades Council & Labourers' International Union of North America, Local 1059 & Labourers' International Union of North America, Ontario Provincial Council and Hotel Employees, Restaurant Employees Union, Local 75 (Respondents) (*Withdrawn*)

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0845-88-OH: Leslie Ann Hardy (Complainant) v. Canadian Foundation for Children & The Law, c.o.b. as Justice for Children (Respondent) (*Withdrawn*)

0858-88-OH: John Clifford (Complainant) v. Joseph Aigner (Respondent) (*Withdrawn*)

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2501-87-G: Ontario Allied Construction Trades Council & Labourers' International Union of North America, Local 1059 & Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ontario Hydro & Electrical Power Systems Construction Association (Respondent) (*Withdrawn*)

0644-88-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Ben Plastering Ltd. c.o.b. as Belmont Plastering Co. (Respondent) (*Withdrawn*)

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1113-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Electrical Power Systems Construction Association & Brown Boveri Howden Inc. (Respondents) (*Withdrawn*)

1142-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bothwell Accurate Co. Ltd. (Respondent) (*Granted*)

1164-88-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Bradsil Limited (Respondent) (*Granted*)

1211-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Rock Construction & Management Ltd. (Respondent) (*Granted*)

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1252-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. TUOMI 83 General Contractors (Respondent) (*Granted*)

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1424-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Teskey Construction Co. Ltd. (Respondent) (*Withdrawn*)

1435-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Division Construction (Respondent) (*Granted*)

1438-88-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Walloy Excavating Ltd. (Respondent) (*Granted*)

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1460-88-G: Ontario Allied Construction Trades Council & Labourers' International Union of North America, Local 597 (Applicant) v. The Electrical Power Systems Construction Association & Ontario Hydro (Respondent) (*Withdrawn*)

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1506-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. The Electrical Power Systems Construction Association & Ontario Hydro (Respondents) (*Withdrawn*)

1514-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. B & Z Construction Inc. (Respondent) (*Withdrawn*)

1541-88-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Bytown Woodworking & Display Inc. (Respondent) (*Granted*)

1560-88-G: Teamsters Local No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers (Applicant) v. Palmic Ltd. (Respondent) (*Withdrawn*)

1573-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. I.P.C.F. Properties Inc. (Respondent) (*Granted*)

1574-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Helmut Kruschat Construction Inc. (Respondent) (*Granted*)

1576-88-G: International Brotherhood of Electrical Workers, Local 105 of the IBEW Construction Council of Ontario (Applicant) v. Adam Clark Co. Ltd. (Respondent) (*Withdrawn*)

1581-88-G: Resilient Floorworkers United Brotherhood of Carpenters & Joiners of America, Local 2965 (Applicant) v. Kal Group Company (Respondent) (*Granted*)

1583-88-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Kappeler Masonry (Conestogo) Ltd. (Respondent) (*Withdrawn*)

1589-88-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Rowles Industrial Insulation (Respondent) (*Granted*)

1659-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Devon Structural Ltd. (Respondent) (*Withdrawn*)

1682-88-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Commonwealth Construction Company Ltd. (Respondent) (*Withdrawn*)

1688-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Applicant) v. Amherst Plumbing Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR ACCREDITATION (CONSTRUCTION INDUSTRY)

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tervener #3) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener #4) (*Granted*)

Unit: "all employers of construction labourers for whom the Labourers International Union of North America, Local 527 has bargaining rights as at October 30, 1987, in the roads, sewers and watermain, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell and, in accordance with the provisions of subsection 127(2) of the *Labour Relations Act*, for such other employers whose employees the Labourers International Union of North America, Local 527 may after October 30, 1987, obtain bargaining rights through certification or voluntary recognition in the sectors in geographic area just described."

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0567-88-R: James S. Sheridan (Applicant) v. Glass, Pottery, Plastics & Allied Workers International Union, Local No. 366 (Respondent) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
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ONTARIO LABOUR RELATIONS BOARD REPORTS

December 1988



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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1988] OLRB REP. DECEMBER

EDITOR: COLLEEN EDWARDS

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Bargaining Unit - Certification - Construction Industry - Whether the collective agreement between MTABA and Labourers Union with respect to the construction of apartment buildings covers carpenters and carpenters apprentices - Issue determined in prior proceeding - *Res judicata* not applicable because different parties - Employees in issue not covered by MTABA agreement - Whether Carpenters Union can carve out its craft from concrete forming agreement - Board discussing its displacement policy - Carpenters Union permitted to carve out its craft

ELLIS-DON LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE THE FORM WORK COUNCIL OF ONTARIO; RE METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION; RE MILNE & NICHOLLS LTD.; RE MOLLENHAUER LIMITED 1254

Bargaining Unit - Certification Where Act Contravened - Practice and Procedure - Respondent arguing that part-time employees and students should be excluded from the unit - Respondent not having a history of employing such persons but plant only in operation a short time - Board not departing from its approach of including such persons in unit - Applicant objecting to the officer disclosing the count - Disclosure ordered - Count particularly important where s.8 relief requested

KUHLMAN PLASTICS OF CANADA LTD.; RE U.A.W.; RE GROUP OF EMPLOYEES 1301

Certification - Abandonment - Bargaining Rights - Bargaining Unit - Collective Agreement - Duty of Fair Representation - Ratification and Strike Vote - Remedies - Unfair Labour Practice - UFCW having municipal-wide bargaining rights - Employer opening up new plant in municipality - Employees in new plant told by employer they were not represented by a union - Union not consulting employees in new plant before concluding collective agreement with terms and conditions of employment alleged to be inferior - Motion brought by RWDSU to set aside collective agreement dismissed - Employees at new plant initially covered by collective agreement at old plant - Parties free to divide unit in two - Division of unit not resulting in abandonment of bargaining rights - Employees at new plant not participating in strike or ratification votes at old plant - Even if technical breach of s. 72(5), no

remedial response warranted - Union breaching fair representation duty by failing to consult employees at new plant before concluding agreement and by failing to conduct a ratification vote - Whether Board has jurisdiction to set aside collective agreement as a remedy where employer not found to have violated the Act - Damages awarded but Board declining to exercise jurisdiction to set aside agreement - Certification application of RWDSU dismissed

CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC; RE U.F.C.W., LOCAL 175 AND U.F.C.W., AFL:CIO:CLC; RE JOHN HENSON, ET AL 1211

Certification - Bargaining Unit - Construction Industry - CLAC applying under s.144(5) to displace the Sheet Metal Workers province-wide ICI craft bargaining unit - Board practice is to give CLAC all unrepresented trades employed in a Board area without reference to sector - Board determining that CLAC can obtain bargaining rights for a craft on a displacement application - CLAC can also limit application to the ICI sector where it is displacing another union - Bargaining rights limited to Board area - Vote counted

REITZEL HEATING & SHEET METAL LTD.; RE C.L.A.C.; RE S.M.W., LOCAL 562 1310

Certification - Bargaining Unit - Construction Industry - Parties agreeing to bargaining unit described as including all "registered" electricians - Designation order not using word "registered" - Board using language in designation order - No need to adjudicate dispute between parties as to whether certain persons are employees because union entitled to certification in any event - Certificates issuing

SUPERIOR CONTRACTING, 510706 ONTARIO LIMITED, OPERATING AS; RE I.B.E.W., LOCAL 1687 1348

Certification - Bargaining Unit - Construction Industry - Whether the collective agreement between MTABA and Labourers Union with respect to the construction of apartment buildings covers carpenters and carpenters apprentices - Issue determined in prior proceeding - *Res judicata* not applicable because different parties - Employees in issue not covered by MTABA agreement - Whether Carpenters Union can carve out its craft from concrete forming agreement - Board discussing its displacement policy - Carpenters Union permitted to carve out its craft

ELLIS-DON LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE THE FORM WORK COUNCIL OF ONTARIO; RE METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION; RE MILNE & NICHOLLS LTD.; RE MOLLENHAUER LIMITED 1254

Certification - Discussion of onus of proof with respect to whether challenged employees are properly included on a list of employees and whether an employee should be excluded from the operation of the Act because of managerial duties - Two of three working foremen included on list

RO-VON CONSTRUCTION LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES 1329

Certification - Membership Evidence - Membership cards signed after workers' employment was terminated but before terminal date given no weight - Vote ordered

CATALYTIC MAINTENANCE INC.; RE L.I.U.N.A., LOCAL 1089 1209

Certification - Natural Justice - Request by employer that panel disqualify itself on the basis that

there was a reasonable apprehension of bias - Chair making remark about the evidence to that point in the hearing - Board discussing objective test - Request denied

CAREFUL HAND LAUNDRY AND DRY CLEANERS LIMITED; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES.....

1205

Certification Where Act Contravened - Bargaining Unit - Practice and Procedure - Respondent arguing that part-time employees and students should be excluded from the unit - Respondent not having a history of employing such persons but plant only in operation a short time - Board not departing from its approach of including such persons in unit - Applicant objecting to the officer disclosing the count - Disclosure ordered - Count particularly important where s.8 relief requested

KUHLMAN PLASTICS OF CANADA LTD.; RE U.A.W.; RE GROUP OF EMPLOYEES.....

1301

Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practice - Employer's announcement of wage increases and other benefits, support for in-plant committee, statements made at employee meetings, support for petition and recall from layoff of most junior employee constituting contraventions of the Act - Union certified without a vote pursuant to s.8

KUHLMAN PLASTICS OF CANADA LTD.; RE U.A.W.; RE GROUP OF EMPLOYEES.....

1284

Charter of Rights and Freedoms - Collective Agreement - Construction Industry - Construction Industry Grievance - Whether the employer can rely on the Charter to challenge the union security clause in the province-wide ICI agreement - Employer not challenging the constitutional validity of the provisions of the Act which bind the employer to the collective agreement - Argument that collective agreement only binding on the employer by operation of statute and therefore subject to the Charter rejected - Board finding that collective agreement not subject to Charter scrutiny - Neither of the parties to the agreement are manifestations of government - Function of negotiating an agreement is not a governmental function - Grievance to be heard on its merits

ARLINGTON CRANE SERVICE LIMITED; RE I.U.O.E., LOCAL 793; RE OPERATING ENGINEERS EMPLOYER BARGAINING AGENCY

1187

Collective Agreement - Abandonment - Bargaining Rights - Bargaining Unit - Certification - Duty of Fair Representation - Ratification and Strike Vote - Remedies - Unfair Labour Practice - UFCW having municipal-wide bargaining rights - Employer opening up new plant in municipality - Employees in new plant told by employer they were not represented by a union - Union not consulting employees in new plant before concluding collective agreement with terms and conditions of employment alleged to be inferior - Motion brought by RWDSU to set aside collective agreement dismissed - Employees at new plant initially covered by collective agreement at old plant - Parties free to divide unit in two - Division of unit not resulting in abandonment of bargaining rights - Employees at new plant not participating in strike or ratification votes at old plant - Even if technical breach of s. 72(5), no remedial response warranted - Union breaching fair representation duty by failing to consult employees at new plant before concluding agreement and by failing to conduct a ratification vote - Whether Board has jurisdiction to set aside collective agreement as a remedy where employer not found to have violated the Act - Damages awarded but Board declining to exercise jurisdiction to set aside agreement - Certification application of RWDSU dismissed

CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC; RE U.F.C.W., LOCAL 175 AND U.F.C.W., AFL:CIO:CLC; RE JOHN HENSON, ET AL

1211

Collective Agreement - Charter of Rights and Freedoms - Construction Industry - Construction Industry Grievance - Whether the employer can rely on the Charter to challenge the union security clause in the province-wide ICI agreement - Employer not challenging the constitutional validity of the provisions of the Act which bind the employer to the collective agreement - Argument that collective agreement only binding on the employer by operation of statute and therefore subject to the Charter rejected - Board finding that collective agreement not subject to Charter scrutiny - Neither of the parties to the agreement are manifestations of government - Function of negotiating an agreement is not a governmental function - Grievance to be heard on its merits	
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Construction Industry - Bargaining Unit - Certification - Parties agreeing to bargaining unit described as including all "registered" electricians - Designation order not using word "registered" - Board using language in designation order - No need to adjudicate dispute between parties as to whether certain persons are employees because union entitled to certification in any event - Certificates issuing	
SUPERIOR CONTRACTING, 510706 ONTARIO LIMITED, OPERATING AS; RE I.B.E.W., LOCAL 1687	1348
Construction Industry - Bargaining Unit - Certification - Whether the collective agreement between MTABA and Labourers Union with respect to the construction of apartment buildings covers carpenters and carpenters apprentices - Issue determined in prior proceeding - <i>Res judicata</i> not applicable because different parties - Employees in issue not covered by MTABA agreement - Whether Carpenters Union can carve out its craft from concrete forming agreement - Board discussing its displacement policy - Carpenters Union permitted to carve out its craft	
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Construction Industry - Charter of Rights and Freedoms - Collective Agreement - Construction Industry Grievance - Whether the employer can rely on the Charter to challenge the union security clause in the province-wide ICI agreement - Employer not challenging the constitutional validity of the provisions of the Act which bind the employer to the collective agreement - Argument that collective agreement only binding on the employer by operation of statute and therefore subject to the Charter rejected - Board finding that collective agreement not subject to Charter scrutiny - Neither of the parties to the agreement are manifestations of government - Function of negotiating an agreement is not a governmental function - Grievance to be heard on its merits	
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BABCOCK AND WILCOX CANADA LTD.; RE QUALITY CONTROL COUNCIL OF CANADA

1198

Construction Industry Grievance - Charter of Rights and Freedoms - Collective Agreement - Construction Industry - Whether the employer can rely on the Charter to challenge the union security clause in the province-wide ICI agreement - Employer not challenging the constitutional validity of the provisions of the Act which bind the employer to the collective agreement - Argument that collective agreement only binding on the employer by operation of statute and therefore subject to the Charter rejected - Board finding that collective agreement not subject to Charter scrutiny - Neither of the parties to the agreement are manifestations of government - Function of negotiating an agreement is not a governmental function - Grievance to be heard on its merits

ARLINGTON CRANE SERVICE LIMITED; RE I.U.O.E., LOCAL 793; RE OPERATING ENGINEERS EMPLOYER BARGAINING AGENCY

1187

Construction Industry Grievance - Construction Industry - Employer arguing that s.124 only available to employees engaged in construction work - Board finding that s.124 encompasses any grievance arising out of any collective agreement between a construction industry trade union and a construction industry employer - Work in this case not covered by collective agreement - Grievance dismissed

BABCOCK AND WILCOX CANADA LTD.; RE QUALITY CONTROL COUNCIL OF CANADA

1198

Construction Industry Grievance - Damages - Remedies - Grievance alleging that respondent violated collective agreement by not convening a mark-up meeting before assigning the work of installing pipe - Board dismissing argument that this was a work assignment dispute - Respondent violating collective agreement - Board awarding damages for losses caused by the failure to hold the mark-up meeting but denying prospective mandatory order

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE

1303

Damages - Construction Industry Grievance - Remedies - Grievance alleging that respondent violated collective agreement by not convening a mark-up meeting before assigning the work of installing pipe - Board dismissing argument that this was a work assignment dispute - Respondent violating collective agreement - Board awarding damages for losses caused by the failure to hold the mark-up meeting but denying prospective mandatory order

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE

1303

Duty of Fair Representation - Abandonment - Bargaining Rights - Bargaining Unit - Certification - Collective Agreement - Ratification and Strike Vote - Remedies - Unfair Labour Practice - UFCW having municipal-wide bargaining rights - Employer opening up new plant in municipality - Employees in new plant told by employer they were not represented by a union - Union not consulting employees in new plant before concluding collective agreement with terms and conditions of employment alleged to be inferior - Motion brought by RWDSU to set aside collective agreement dismissed - Employees at new plant initially covered by collective agreement at old plant - Parties free to divide unit in two - Division of unit not resulting in abandonment of bargaining rights - Employees at new plant not partici-

pating in strike or ratification votes at old plant - Even if technical breach of s. 72(5), no remedial response warranted - Union breaching fair representation duty by failing to consult employees at new plant before concluding agreement and by failing to conduct a ratification vote - Whether Board has jurisdiction to set aside collective agreement as a remedy where employer not found to have violated the Act - Damages awarded but Board declining to exercise jurisdiction to set aside agreement - Certification application of RWDSU dismissed

CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC; RE U.F.C.W., LOCAL 175 AND U.F.C.W., AFL:CIO:CLC; RE JOHN HENSON, ET AL 1211

Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Union breaking away from Ad Hoc Committee established to bargain the issue of pensions with the employer jointly with other bargaining agents - Employer breaching bargaining duty by pressing to impose its position that the issue of pensions be bargained under the aegis of the Committee and by refusing to otherwise receive and negotiate the union's pension proposals - Posting not ordered but decision to be sent to all bargaining unit members - Damages denied because Board not convinced that unsuccessful strike would not have occurred but for the employer's position on negotiating pensions through the Committee

UNIVERSITY OF WINDSOR; RE C.U.P.E., LOCAL 1001; RE S.E.U., LOCAL 210; RE SUSAN DUFOUR..... 1351

Financial Statements - Complainant under s.85(2) arguing that union's financial statements inadequate because they were audited by a Certified General Accountant rather than a Chartered Accountant - Board looking at jurisprudence under s.85(1) - No evidence that the audit was inadequate - Complaint dismissed

KOZAK, JOHN; RE C.J.A., LOCAL 27 1281

Health and Safety - Worker refusing to work a job drawing wire without a helper - Worker sent home following work refusal - Safety inspector called following day finding that work not unsafe - Board discussing the two-tiered process of investigation - Board finding that it could not use the safety inspector's report, written after the work refusal, to determine whether the worker objectively believed the work was unsafe - Worker sent home for lack of alternative work and not because he was exercising his statutory rights - No need for Board to determine whether objective test in fact satisfied - Complaint dismissed

SIDBEC DOSCO INC.; RE GRANT ELGAARD 1334

Interference in Trade Unions - Certification Where Act Contravened - Unfair Labour Practice - Employer's announcement of wage increases and other benefits, support for in-plant committee, statements made at employee meetings, support for petition and recall from layoff of most junior employee constituting contraventions of the Act - Union certified without a vote pursuant to s.8

KUHLMAN PLASTICS OF CANADA LTD.; RE U.A.W.; RE GROUP OF EMPLOYEES 1284

Interference in Trade Unions - Remedies - Unfair Labour Practice - Employees seeking permission to leave work early to attend strike preparation meeting - Permission to leave refused or revoked - Employees suspended for two to three days on grounds of insubordination after leaving work without permission - Unfair labour practice complaint dismissed - Board jurisprudence indicating that interests must be balanced - Board not determining whether Act violated because it would not in any event grant the remedies requested by the union

DEL EQUIPMENT LIMITED, DEL HYDRAULICS LIMITED AND EDINBURGH ELECTRIC LIMITED; RE C.A.W. 1248

VIII

- Membership Evidence - Certification - Membership cards signed after workers' employment was terminated but before terminal date given no weight - Vote ordered
- CATALYTIC MAINTENANCE INC.; RE L.I.U.N.A., LOCAL 1089..... 1209
- Natural Justice - Certification - Request by employer that panel disqualify itself on the basis that there was a reasonable apprehension of bias - Chair making remark about the evidence to that point in the hearing - Board discussing objective test - Request denied
- CAREFUL HAND LAUNDRY AND DRY CLEANERS LIMITED; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES..... 1205
- Petition - Termination - Fifty percent of bargaining unit comprised of employees who were closely related to the owners of the business - Signatures of family members on petition found voluntary - Vote ordered
- KING GEORGE HOTEL, REAL DELAGE; RE GILLES DELAGE; RE HOTELS, CLUBS, RESTAURANTS AND TAVERNS EMPLOYEES' UNION, LOCAL 261 1278
- Practice and Procedure - Bargaining Unit - Certification Where Act Contravened - Respondent arguing that part-time employees and students should be excluded from the unit - Respondent not having a history of employing such persons but plant only in operation a short time - Board not departing from its approach of including such persons in unit - Applicant objecting to the officer disclosing the count - Disclosure ordered - Count particularly important where s.8 relief requested
- KUHLMAN PLASTICS OF CANADA LTD.; RE U.A.W.; RE GROUP OF EMPLOYEES..... 1284
- Ratification and Strike Vote - Abandonment - Bargaining Rights - Bargaining Unit - Certification - Collective Agreement - Duty of Fair Representation - Remedies - Unfair Labour Practice - UFCW having municipal-wide bargaining rights - Employer opening up new plant in municipality - Employees in new plant told by employer they were not represented by a union - Union not consulting employees in new plant before concluding collective agreement with terms and conditions of employment alleged to be inferior - Motion brought by RWDSU to set aside collective agreement dismissed - Employees at new plant initially covered by collective agreement at old plant - Parties free to divide unit in two - Division of unit not resulting in abandonment of bargaining rights - Employees at new plant not participating in strike or ratification votes at old plant - Even if technical breach of s. 72(5), no remedial response warranted - Union breaching fair representation duty by failing to consult employees at new plant before concluding agreement and by failing to conduct a ratification vote - Whether Board has jurisdiction to set aside collective agreement as a remedy where employer not found to have violated the Act - Damages awarded but Board declining to exercise jurisdiction to set aside agreement - Certification application of RWDSU dismissed
- CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC; RE U.F.C.W., LOCAL 175 AND U.F.C.W., AFL:CIO:CLC; RE JOHN HENSON, ET AL 1211
- Remedies - Abandonment - Bargaining Rights - Bargaining Unit - Certification - Collective Agreement - Duty of Fair Representation - Ratification and Strike Vote - Unfair Labour Practice - UFCW having municipal-wide bargaining rights - Employer opening up new plant in municipality - Employees in new plant told by employer they were not represented by a union - Union not consulting employees in new plant before concluding collective agreement with terms and conditions of employment alleged to be inferior - Motion brought by RWDSU to set aside collective agreement dismissed - Employees at new plant initially covered by collective agreement at old plant - Parties free to divide unit in two - Division of

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CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC; RE U.F.C.W., LOCAL 175 AND U.F.C.W., AFL:CIO:CLC; RE JOHN HENSON, ET AL 1211

Remedies - Construction Industry Grievance - Damages - Grievance alleging that respondent violated collective agreement by not convening a mark-up meeting before assigning the work of installing pipe - Board dismissing argument that this was a work assignment dispute - Respondent violating collective agreement - Board awarding damages for losses caused by the failure to hold the mark-up meeting but denying prospective mandatory order

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE 1303

Remedies - Duty to Bargain in Good Faith - Unfair Labour Practice - Union breaking away from Ad Hoc Committee established to bargain the issue of pensions with the employer jointly with other bargaining agents - Employer breaching bargaining duty by pressing to impose its position that the issue of pensions be bargained under the aegis of the Committee and by refusing to otherwise receive and negotiate the union's pension proposals - Posting not ordered but decision to be sent to all bargaining unit members - Damages denied because Board not convinced that unsuccessful strike would not have occurred but for the employer's position on negotiating pensions through the Committee

UNIVERSITY OF WINDSOR; RE C.U.P.E., LOCAL 1001; RE S.E.U., LOCAL 210; RE SUSAN DUFOUR..... 1351

Remedies - Interference in Trade Unions - Unfair Labour Practice - Employees seeking permission to leave work early to attend strike preparation meeting - Permission to leave refused or revoked - Employees suspended for two to three days on grounds of insubordination after leaving work without permission - Unfair labour practice complaint dismissed - Board jurisprudence indicating that interests must be balanced - Board not determining whether Act violated because it would not in any event grant the remedies requested by the union

DEL EQUIPMENT LIMITED, DEL HYDRAULICS LIMITED AND EDINBURGH ELECTRIC LIMITED; RE C.A.W. 1248

Termination - Petition - Fifty percent of bargaining unit comprised of employees who were closely related to the owners of the business - Signatures of family members on petition found voluntary - Vote ordered

KING GEORGE HOTEL, REAL DELAGE; RE GILLES DELAGE; RE HOTELS, CLUBS, RESTAURANTS AND TAVERNS EMPLOYEES' UNION, LOCAL 261 1278

Unfair Labour Practice - Abandonment - Bargaining Rights - Bargaining Unit - Certification - Collective Agreement - Duty of Fair Representation - Ratification and Strike Vote - Remedies - UFCW having municipal-wide bargaining rights - Employer opening up new plant in municipality - Employees in new plant told by employer they were not represented by a union - Union not consulting employees in new plant before concluding collective agreement with terms and conditions of employment alleged to be inferior - Motion brought by RWDSU to set aside collective agreement dismissed - Employees at new plant initially covered by collective agreement at old plant - Parties free to divide unit in two - Division of

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CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC; RE U.F.C.W., LOCAL 175 AND U.F.C.W., AFL:CIO:CLC; RE JOHN HENSON, ET AL 1211

Unfair Labour Practice - Certification Where Act Contravened - Interference in Trade Unions - Employer's announcement of wage increases and other benefits, support for in-plant committee, statements made at employee meetings, support for petition and recall from layoff of most junior employee constituting contraventions of the Act - Union certified without a vote pursuant to s.8

KUHLMAN PLASTICS OF CANADA LTD.; RE U.A.W.; RE GROUP OF EMPLOYEES 1284

Unfair Labour Practice - Duty to Bargain in Good Faith - Remedies - Union breaking away from Ad Hoc Committee established to bargain the issue of pensions with the employer jointly with other bargaining agents - Employer breaching bargaining duty by pressing to impasse its position that the issue of pensions be bargained under the aegis of the Committee and by refusing to otherwise receive and negotiate the union's pension proposals - Posting not ordered but decision to be sent to all bargaining unit members - Damages denied because Board not convinced that unsuccessful strike would not have occurred but for the employer's position on negotiating pensions through the Committee

UNIVERSITY OF WINDSOR; RE C.U.P.E., LOCAL 1001; RE S.E.U., LOCAL 210; RE SUSAN DUFOUR 1351

Unfair Labour Practice - Interference in Trade Unions - Remedies - Employees seeking permission to leave work early to attend strike preparation meeting - Permission to leave refused or revoked - Employees suspended for two to three days on grounds of insubordination after leaving work without permission - Unfair labour practice complaint dismissed - Board jurisprudence indicating that interests must be balanced - Board not determining whether Act violated because it would not in any event grant the remedies requested by the union

DEL EQUIPMENT LIMITED, DEL HYDRAULICS LIMITED AND EDINBURGH ELECTRIC LIMITED; RE C.A.W. 1248

2864-85-M International Union of Operating Engineers, Local 793, Applicant v. Arlington Crane Service Limited, Respondent v. Operating Engineers Employer Bargaining Agency, Intervener

Charter of Rights and Freedoms - Collective Agreement - Construction Industry - Construction Industry Grievance - Whether the employer can rely on the Charter to challenge the union security clause in the province-wide ICI agreement - Employer not challenging the constitutional validity of the provisions of the Act which bind the employer to the collective agreement - Argument that collective agreement only binding on the employer by operation of statute and therefore subject to the Charter rejected - Board finding that collective agreement not subject to Charter scrutiny - Neither of the parties to the agreement are manifestations of government - Function of negotiating an agreement is not a governmental function - Grievance to be heard on its merits

BEFORE: Harry Freedman, Vice-Chair, and Board Members F. W. Murray and D. A. Patterson.

APPEARANCES: Bernard Fishbein, Jack Slaughter, Joseph Kennedy and E. A. Ford for the applicant; Thomas A. Stefanik, Lynn Bevan and Dorothy Foran for the respondent; Pamela Yudcovitch and Jim Thomson for the intervener; Valerie Lawson on behalf of the Attorney General of Ontario.

DECISION OF THE BOARD; December 19, 1988

1. In this arbitration proceeding before the Board, counsel for the respondent raised the *Canadian Charter of Rights and Freedoms* as a defence to the allegation that the respondent violated the collective agreement between the Operating Engineers Employee Bargaining Agency and the Operating Engineers Employer Bargaining Agency. While the grievance claims that the respondent violated several provisions of that collective agreement, counsel for the applicant advised the Board that the applicant sought relief only in respect of a violation of article 3 of that collective agreement.

2. Article 3 of the collective agreement is entitled "union security" and contains various sections which require, among other things, that the respondent hire and employ members of the applicant, deduct and remit dues to the applicant, and engage sub-contractors who are in contractual relations with the applicant. The respondent claimed that article 3 of the collective agreement infringed several of the respondent's rights under the Charter and therefore was of no force or effect.

3. The parties agreed to the manner in which the Board should deal with the Charter defence raised by the respondent. The Board in paragraph 2 of its decision in this matter dated January 19, 1987 wrote:

"The respondent takes the position that the relevant provision of the collective agreement is void by reason of it being contrary to the *Canadian Charter of Rights and Freedoms*. Counsel for the applicant takes the position that the *Canadian Charter of Rights and Freedoms* has no application to this issue. The parties agree that the preliminary issue of whether the relevant provision of the collective agreement is subject to the *Canadian Charter of Rights and Freedoms* should be dealt with by the Board first. ..."

4. When the hearing in this matter reconvened, counsel for the applicant submitted that the respondent was bound to the collective agreement by reason of its membership in the Crane Rental Association of Ontario, a constituent element or member of the Operating Engineers Employer Bargaining Agency. Counsel submitted that the respondent's membership in an employ-

ers' organization that was part of the Operating Engineers Employer Bargaining Agency created the contractual obligation that bound the respondent to the collective agreement negotiated by the Operating Engineers Employer Bargaining Agency on behalf of members of its constituent organizations as well as on behalf of those employers who were not members of those organizations, but who were represented in collective bargaining by the Operating Engineers Employer Bargaining Agency as a result of the operation of section 143 of the *Labour Relations Act* and the designation made by the Minister of Labour pursuant to section 139(1)(b) of the Act. Counsel argued that those provisions of the Act which mandate the Operating Engineers Employer Bargaining Agency to represent employers who are not members of any of the employers' organizations that comprise the Operating Engineers Employer Bargaining Agency are simply irrelevant to this proceeding.

5. Counsel also contended that the collective agreement before us in this proceeding applies to all sectors of the construction industry and is not restricted to the industrial, commercial and institutional sector. The grievance before the Board in this proceeding is also not restricted to work done by the respondent in the industrial, commercial and institutional sector of the construction industry, but rather relates to all sectors of that industry. Counsel submitted that the respondent was bound by that collective agreement in respect of work outside of the industrial, commercial and institutional sector in the same way that it was bound by the collective agreement in respect of that sector, that is, by virtue of its membership in the Crane Rental Association of Ontario. Counsel therefore submitted that the Charter simply has no relevance whatever to the collective agreement in respect of the respondent since the respondent was bound to the collective agreement by reason of private contractual obligations arising out of membership in an employers' organization that bargained with the applicant on behalf of the respondent and not by reason of legislation.

6. The Board received evidence from Ernest Ford, the Labour Relations Manager of the applicant from January 1, 1971 to June 1, 1987 and from Jack Redshaw, a business agent with the applicant for twenty years until July 31, 1986. Mr. Redshaw was the applicant's business agent in the Hamilton area for approximately thirteen years and was quite familiar with the respondent and its operations.

7. Both Mr. Ford and Mr. Redshaw testified that the Crane Rental Association of Ontario had represented the respondent in collective bargaining for a number of years. Mr. Ford identified documents that the applicant received from the Crane Rental Association of Ontario which stated that the respondent or its predecessor was a member of the Crane Rental Association of Ontario as far back as September, 1975. Mr. Redshaw testified that he had negotiated directly with the respondent many years ago, and both Mr. Redshaw and Mr. Ford testified that more recently, the Crane Rental Association of Ontario negotiated on behalf of the respondent. Both Mr. Ford and Mr. Redshaw also testified that the applicant had not received any communications from either the respondent or the Crane Rental Association of Ontario advising that the respondent was no longer a member of the Crane Rental Association of Ontario or that the Crane Rental Association of Ontario had ceased to represent the respondent in collective bargaining.

8. Mr. Redshaw was not aware that the respondent denied being a member of the Crane Rental Association of Ontario. Both Mr. Redshaw and Mr. Ford had been involved in numerous prior Board proceedings between these parties where the issue of whether the respondent was bound to the collective agreement between the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency, or its predecessor collective agreements between the applicant and the Crane Rental Association of Ontario were dealt with by the Board.

9. There have been several earlier proceedings before the Board involving these two parties where the applicant alleged that the respondent violated the collective agreement. In Board File No. 1652-76-M, decision dated June 15, 1977, the Board recorded the following agreed fact:

"The facts which form the background to this grievance are not in dispute. ... The applicant and the respondent are covered by a collective agreement between the applicant and the Crane Rental Association of Ontario, which commenced on May 1, 1975 and which expired on April 30, 1977."

In Board File No. 0729-77-M, decision dated September 2, 1977, the Board stated:

"... having regard to the admission by the respondent Arlington Crane Service Limited at the hearing of the instant grievance that any terms and conditions of employment of its employees were governed by the collective agreement between the Crane Rental Association of Ontario and the applicant dated September 5, 1975, and that it continued to deal with its employees outside of the collective agreement under the scheme described in the Board's decision of June 15, 1977 from the date of that decision to the date of the hearing of the instant grievance, the Board finds as follows:

1. That the respondent Arlington Crane Service Limited has at all material times been bound by the terms of the said collective agreement."

In Board File No. 0786-81-M, decision dated, August 28, 1981, the Board made the following determination based on the agreement of the parties:

"Having regard to the foregoing, to the representations before it and pursuant to the provisions of section 112a of the Act, the Board makes the following determination:

1. The International Union of Operating Engineers, Local 793, and Arlington Crane Service Limited are bound by a collective agreement between the Operating Engineers Employee Bargaining Agency and the Operating Engineers Employer Bargaining Agency. This collective agreement is in effect from May 1, 1980, until April 30, 1982."

In Board File No. 0338-82-M, decision dated June 21, 1982 the Board dealt with a grievance alleging a violation of article 3 of a predecessor to the collective agreement before us in this proceeding. In the course of finding a violation of that collective agreement, the Board wrote:

"... The parties advised that that part of the grievance alleging that the respondent employer has failed to remit regular monthly dues, working dues, training fund, pension and benefit and labour relations fund contributions on behalf of all employees covered by the collective agreement has been settled between the parties. The issue to be determined is whether the respondent employer has hired an apprentice contrary to article 3.1(a).

The facts in this matter are as follows:

- Both parties to this application are bound by the terms of the province-wide collective agreement entered into by the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency on May 7, 1980."

In Board File Nos. 2222-82-M and 2509-82-M, decision dated March 25, 1983, the Board recorded the following agreed fact:

"The parties to the above Referrals of Grievance to Arbitration pursuant to Section 124 of the *Labour Relations Act*, each agree with the other, as to the following facts. The parties agree to call no further evidence and make argument and representations to the Board on these agreed facts. The parties further agree that the Board remain seized with the issue of damages, if any, and the parties are free to call whatever evidence they feel appropriate on the damages issue, if necessary.

1. Arlington Crane Service Ltd. ('Arlington') acknowledges that it is bound to the provincial collective agreement between Operating Engineers Employer Bargaining Agency and Operating Engineers Employee Bargaining Agency, effective July 5, 1982 until April 30, 1984 ('the collective agreement')."

In Board File No. 1959-83-M, decision dated March 5, 1984 the Board wrote:

"There was no dispute that the applicant and the respondent are bound by the provincial collective agreement effective from May 1, 1982, until April 30, 1984, between the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency. The grievance in this referral involves the interpretation and application of article 3.4. ..."

10. Mr. Stefanik, counsel for the respondent on this issue, did not contest that the respondent was bound by the collective agreement as a matter of statute. Indeed, the respondent relies on that as the basis for asserting that the collective agreement is subject to the Charter. Counsel argued that there was no direct admissible evidence establishing that the respondent was a member of the Crane Rental Association of Ontario at the times relevant to this proceeding. All of the prior Board decisions which found that the respondent was bound by the collective agreement did not articulate the grounds for that finding. Counsel submitted that an employer may be bound by the collective agreement through various means, and not necessarily because an employer is a member of an employer's organization.

11. We are satisfied that the respondent was, at all material times, bound by the collective agreement in respect of all sectors of the construction industry. We accept that there was not any direct evidence as to whether the respondent was actually a member of the Crane Rental Association of Ontario. The lists supplied to the applicant by the Crane Rental Association of Ontario were hearsay evidence with respect to the fact of membership. Those lists were admitted to establish, pursuant to section 51(2) of the Act, that the Crane Rental Association of Ontario bargained on behalf of the respondent. The direct evidence of Mr. Redshaw and Mr. Ford and the findings set out in the previous Board decisions between these parties satisfies us that the Crane Rental Association of Ontario bargained on behalf of the respondent and that the respondent accepted that situation until sometime after the grievance before us was referred to arbitration. Thus, while there was no direct evidence to establish that the respondent was a member of the Crane Rental Association of Ontario, the evidence that the respondent was bound by collective agreement between the applicant and the Crane Rental Association of Ontario and the evidence that the Crane Rental Association of Ontario represented the respondent in collective bargaining causes us to conclude that it is more probable than not that the respondent was a member of the Crane Rental Association of Ontario. We are reinforced in our conclusion on this issue by the respondent's failure to call any evidence to deny that it was a member of the Crane Rental Association of Ontario. In the result, we are satisfied that section 51 of the Act operated to bind the respondent to the collective agreement at all material times. See *Paul D'Auost Construction*, [1976] OLRB Rep. Sept. 529; *Great Lakes Fabricating*, [1982] OLRB Rep. June 872; *London Sandblasting & Painting Limited*, [1982] OLRB Rep. Sept. 1322; *Twin Electric*, [1984] OLRB Rep. Feb. 393; *David Yan Construction Limited*, [1984] OLRB Rep. May 715.

12. Apart from section 51 of the Act, it is also clear that the respondent was bound by the collective agreement in respect of the industrial, commercial and institutional sector of the construction industry by virtue of section 143 of the Act and the Ministerial designation made under section 139(1)(b) of the Act dated March 31, 1978. It is uncontested that the applicant holds bargaining rights for employees of the respondent. We accept that the respondent did not actually negotiate or sign the collective agreement with the applicant. Rather, the collective agreement which is the subject of this dispute is binding upon the respondent by operation of section 143,

insofar as the collective agreement applies to industrial, commercial and institutional sector. Counsel for the respondent submits that as there is a legislative foundation upon which the applicant bases its assertion that the respondent is bound to the collective agreement, that also creates the basis for asserting that the collective agreement is void by reason that it is contrary to the Charter.

13. Ms. Bevan, counsel for the respondent on this issue, reviewed the provincial bargaining provisions of the Act in detail in support of her submissions that the collective agreement was subject to Charter scrutiny. Her analysis of the legislation began with the proposition that the collective agreement to which the respondent is subject was only binding on the respondent by operation of statute and therefore was subject to the Charter. She pointed out that the Minister of Labour designated who will be parties to the collective agreement, their collective bargaining is mandated by statute and is enforced through the statutory dispute resolution processes created under the Act. She argued that the collective agreement is so inextricably tied to the legislation that the collective agreement in this case is subject to Charter review in the same way that the legislation is subject to Charter review.

14. While much of counsel's argument dealt with the legislative scheme established by the province-wide bargaining provisions of the Act which, without doubt, must conform with the Charter in order to be effective, the issue the parties put before the Board was *not* the constitutionality of the legislation, but rather whether article 3 of the collective agreement was subject to the Charter. The nature of the specific issue which the parties agreed to address was explicitly set out in the Board's earlier decision in this matter, quoted in paragraph 3 above and in paragraph 3 of that decision where the Board again stated:

"The parties agree that the Board should determine as a preliminary matter the issue of whether the relevant provision of the collective agreement is subject to the Charter."

Subsequent to that decision, counsel for the respondent in a letter to the solicitors for the applicant dated June 3, 1987 wrote:

"The Respondent denies that the contents of Article 3 of the collective agreement are a matter of private contract between the parties. The Respondent intends to rely upon sections 117, 118, 137, 138, 139, 142, 143, 145 and 146 of the *Labour Relations Act*.

In the alternative, should it be found that the contents of Article 3 of the collective agreement are a private contract, the respondent states that such contract by its nature in any event is subject to the Charter."

Counsel for the respondent in a letter of June 11, 1987 to the solicitors for the applicant also wrote:

"It is my understanding that at the hearing on June 29 and 30, 1987 the parties would be arguing the issue of whether the relevant provision of the collective agreement is subject to the Canadian Charter of Rights and Freedoms, and only that issue."

Thus, the Board is required to determine whether article 3 of the collective agreement is subject to the Charter, or to put it another way, whether the respondent can rely on the Charter to challenge the validity of article 3 of the collective agreement. We emphasize that the respondent did not in this proceeding before the Board challenge the constitutional validity of the various provisions of the *Labour Relations Act* which bound the respondent to the collective agreement.

15. The rights and protections afforded to individuals and persons in our society by the Charter do not apply to all relationships that exist between or among the members of Canadian society. Rather, the Charter's application is limited by section 32(1) which provides:

"This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

The limits of the Charter's application are also made clear by section 52(1) of the Charter which provides:

"The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

16. The combination of sections 32(1) and 52(1) of the Charter establishes that the Charter applies to the activities carried on by government but does not apply to the activity of persons or entities that are not a manifestation of government. Where, however, there is a legislative foundation for the action of a person or entity that is not a part of government, whether the Charter applies is open to question.

17. In *Blainey v. Ontario Hockey Association*, (1986), 54 O.R. (2d) 513, the Ontario Court of Appeal determined that a provision of the Ontario Human Rights Code which permitted discrimination on the basis of sex in respect of participation in athletic activities or membership in an athletic organization was contrary to the Charter. In that case membership in the athletic organization was restricted to males by reason of the organization's by-laws. The issue before the Court of Appeal as characterized by the majority, Finlayson, J.A. dissenting, was whether the relevant provision of the Ontario Human Rights Code and *not* the by-law of the athletic organization was contrary to the Charter. The majority of the Court nevertheless did receive and dispose of the arguments that the organization's by-laws were subject to Charter scrutiny by reason of the application of the Charter itself, or alternatively, by reason of the nature of the organization. The Court of Appeal at 521-22 adopted the following passage from Professor Swinton's article in Tarnopolsky and Beaudoin, *The Canadian Charter of Rights and Freedoms Commentary* 1982 at 44-45:

"The automatic response to a suggestion that the Charter can apply to private activity, without connection to government, will be that a Charter of Rights is designed to bind governments, not private actors. That is the nature of a constitutional document; to establish the scope of governmental authority and to set out the terms of the relationship between the citizen and the state and those between the organs of government. The purpose of a Charter of Rights is to regulate the relationship of an individual with the government by invalidating laws and governmental activity which infringe the rights guaranteed by the document, while relationships between individuals are left to the regulation of human rights codes, other statutes, and common law remedies, such as libel and slander laws. Furthermore, s. 32(1) specifically states that the Charter applies to 'the Parliament and government of Canada *in respect of* all matters within the authority of Parliament' (emphasis added). It is governmental action which is caught, not private action."

18. That Court also rejected the argument that the association was acting as an arm of government. The Court of Appeal wrote at 522-23:

"In the alternative, it was submitted by counsel for the appellant and for the Canadian Association for the Advancement of Women and Sport that the C.A.H.A. and the O.H.A. were agents of the Government of Canada, and their rules could be regarded as acts done pursuant to powers granted by law. In that respect, the comment made by Dickson J. in *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441 at p. 459, 18 D.L.R. (4th) 481 at p. 494, 13 C.R.R. 287, is also germane:

I would like to note that nothing in these reasons should be taken as the adoption of the view that the reference to 'laws' in s. 52 of the *Charter* is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52.

However, assuming that there can exist a relationship between 'government' and private citizens and organizations so that the actions of the citizen or organization can be considered 'actions of government' for the purposes of the Charter, in my opinion no such nexus has been established in this case. The only relationship that has been established between the Government of Canada and the C.A.H.A. and the O.H.A. is that they receive grants from the federal government under the *Fitness and Amateur Sport Act*, R.S.C. 1970, c. F-25. They also receive grants from various municipalities. There has been no delegation of power by Parliament or the Legislature to the C.A.H.A. or the O.H.A., nor have they been granted any powers by governments.

On the record before this Court, neither the C.A.H.A. nor the O.H.A. in conducting their activities can in any way be said to be doing so as some form of governmental agency or exercising a governmental function. I agree with the following comment made by Steele J. at p. 231 O.R., p. 605 D.L.R.:

This does not make the C.A.H.A. or the O.H.A. governmental agencies. To hold otherwise would mean that all industries, charities and other organizations that receive government grants are performing government functions and are subject to the *Charter*. This is not the intent of s. 32 of the *Charter*."

19. The proper application of the Charter was also addressed by the Ontario Court of Appeal in *McKinney v. University of Guelph*, (1987), 63 O.R. (2d) 1. The majority of the Court discussed the scope of the Charter's role at page 17:

"What the Charter did was to recognize existing rights and freedoms, fulfil the gestation of others, and create new ones. It acts as a guarantee of these rights and freedoms and is a direction to government at the federal and provincial levels that no action of theirs is to be in conflict with its standards in the human and civil rights field. It therefore follows that if the rights of a citizen have been adversely affected in a particular instance, recourse is first had to the relevant human rights legislation enacted at the appropriate constitutional level. Where the conduct complained of is sanctioned by that human rights legislation or any other legislation, resort is then had to the Charter to determine if the legislation in question is inconsistent with the Charter. If it is, it is the legislation that will be struck down to the extent of the inconsistency. The person aggrieved may then pursue his or her remedies and the party formerly relying on the impugned legislation will have to address the complaint on its merits. The Charter does not apply to private activity; that is governed (if it is governed at all) by the human rights legislation enacted by the two levels of government."

20. The Supreme Court of Canada in *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Limited*, (1986) 33 D.L.R. (4th) 174 held that the Charter did not apply to "private" arrangements, but also expressly noted that where a party to the arrangement relies on governmental action, the Charter could be applicable. The Court wrote at 198:

"It would also seem that the Charter would apply to many forms of delegated legislation, regulations, Orders in Council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the legislatures. It is not suggested that this list is exhaustive. Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable."

While it seems that the Court's comment might invite Charter scrutiny of any conduct carried out by a non-government party pursuant to any statutory authority, the Court also pointed out that it was the statutory provision authorizing the activity that would be the subject of Charter scrutiny and not the activity itself. The Court wrote at 198:

"If in our case one could point to a statutory provision specifically outlawing secondary picketing of the nature contemplated by the appellants, the case -- assuming for the moment an infringement of the Charter -- would be on all fours with *Blainey* and, subject to s. 1 of the Charter, the statutory provision could be struck down. In neither case, would it be, as Professor Hogg would have it, the order of a court which would remove the case from the private sphere. It would be the result of one party's reliance on a *statutory provision violative* of the Charter."

[emphasis added]

21. The analysis of this issue by the Court of Appeal in *McKinney, supra*, also clearly focused attention on the statutory authority authorizing the activity which is being challenged, and not the activity itself. See *McKinney, supra* at 20-24. It seems therefore that if the conduct under attack is permitted or authorized by governmental action, such as a statute, regulation, order in council, etc. the Charter can be invoked to determine whether the statute, regulation, order in council etc. infringes the Charter, but that the Charter does not apply to the conduct itself unless that conduct can itself be viewed as the action of government. See *McKinney, supra* at 25-28.

22. In the case before us, the collective agreement, as it relates to the industrial, commercial and institutional sector of the construction industry was negotiated by the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency, both of which were designated by the Minister of Labour pursuant to the *Labour Relations Act*. Those agencies were authorized to represent employers and trade union unions in collective bargaining. However, their creation, administration and operation are not controlled by the Minister. There was no suggestion that the Minister of Labour gave directions to those agencies to act in a particular way. The employer bargaining agency is analogous, in our view, to any other "body exercising statutory authority" to which the Court of Appeal in *McKinney, supra*, referred in the following passage at p. 23-25:

"To say that 'any body exercising statutory authority' is 'bound by the Charter' would mean that incorporated companies operating anything from a corner store to a world-wide cartel would be subject to the Charter. It would include innumerable bodies and indeed almost any organization which has been incorporated, because almost all can be said to be exercising statutory authority. The statement that a corporation exercising statutory powers must stay within the ambit of those powers does not mean that in exercising those powers it does so as 'government'. It may well be exercising those powers as a private entity. The statement: 'action taken under statutory authority is valid only if it is within the scope of that authority', is a correct statement of the law before and after the Charter, but it does not follow that an *ultra vires* action by the delegatee of statutory power will cause the delegatee to become the subject of Charter scrutiny. Actions taken outside of statutory authority may well attract the attention of the courts by way of judicial review, or give rise to actions for damages, or they may be ignored as ineffective. If the statutory authority is itself inconsistent with the Charter, it can be struck down. If the action taken by the delegatee of statutory authority is *ultra vires* the statutory authority, the existing law provides a remedy. But, if the action taken by the delegatee is *intra vires* constitutionally valid statutory authority, it cannot be challenged under the Charter but only under the constitutionally appropriate human rights statute. In the case on appeal that statute is the Ontario *Human Rights Code*, 1981. ...

The fact that municipal corporations are "creatures of the legislature" is not determinative. It is the function that they were created to perform that is. 'Creatures of the Legislature' do not automatically become accountable to the Charter: they remain accountable to their 'creator'. Ordinarily, it is their 'creator' which would attract the reach of the Charter, but municipal corporations differ from other statutory corporations in that they are incorporated by government to perform a governmental function; a function that the provincial government could and often does perform itself. As such, they can be considered 'a distinct level of government' to use Linden J.'s phrase, or 'a branch of government' to use that of McIntyre J. in *Dolphin Delivery, supra*. But it is the function for which they are incorporated that gives them this status and not

the mere fact that they are incorporated and have their authority to act bestowed upon them by their incorporating statute.

We do not believe that the various criteria that are identified by either the appellants or the respondent universities are very significant in determining if the respondent universities are subject to the Charter. In our view, the extent to which the respondent universities receive financial support from the provincial government is irrelevant to a determination as to whether they are performing governmental functions or simply providing a public service. Their source of funds may reflect on their independence but it is of little help in determining their function. The fact that they have certain legislated crutches and perquisites is similarly not determinative of their role.

Further, we do not think it makes any difference that the Ministry of Education has made regulations with respect to admission standards or any goals or objectives in the educational process. The fact is that the universities are autonomous, they have boards of governors, or a governing council, the majority of whose members are elected or appointed independent of government. They pursue their own goals within the legislated limitations of their incorporation. With respect to the employment of professors, they are masters in their own houses.

In support of the submission that universities are bound by the Charter, counsel argued that they form part of the administrative machinery of government because they are subject to the supervisory authority of the courts through the traditional prerogative remedies. This can hardly be the test since our courts have never been reluctant to interfere in the internal affairs of wholly private organizations where members complain of a breach of internal rules or a denial of natural justice. Whether relief is available through civil action for declaratory relief, injunctive relief, an award of damages or resort to the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, is merely a matter of choice of remedies and is not determinative of whether or not a body is an emanation of government, performing a governmental function."

23. A similar finding was made by the British Columbia Court of Appeal in *Harrison v. University of British Columbia*, (1987), 48 D.L.R. (4th) 687. In that case the Court found that the University was not an extension of government, and its mandatory retirement policy was a matter of private contract and not the exercise of a public function. The approach to that problem was set out by the Court at page 692-693:

"In other words, where the act alleged to infringe the Charter is the act of a branch of government as defined in *Dolphin Delivery*, the Charter applies. Where, on the other hand, the impugned act is the act of a body other than Parliament, the legislatures or their executives, it will be subject to the Charter to the extent that it bears a direct and definable connection to an act of Parliament, the legislatures or their executives, thereby establishing an exercise of governmental power. This result is in accordance with the purpose of the Charter of protecting individual rights against undue infringement by the more powerful state. To permit Parliament, the legislatures or the executive arms of government to avoid the Charter by delegating their functions to, or dictating the conduct of, subsidiary bodies, which are immune from Charter scrutiny, would run counter to that purpose. The state acting through a subsidiary agent should be equally subject to the Charter as the state acting directly.

Viewed thus, the question in this case is whether there is such a "direct and precisely defined connection" between the government and the acts of university alleged to violate the Charter, that those acts may be regarded as the exercise of governmental power. That connection might be established if it were found that the government exercises sufficient control over the university that the acts in question should be regarded as the government's acts. The requisite connection might also be found if the act in question was done pursuant to a specific delegation of governmental power; in such a case, government power would be exercised, and it is that government power which attracts Charter scrutiny. This list is not comprehensive. In other cases, other factors may be relevant to determine whether a direct link with government is established."

24. The negotiation of a collective agreement by the Operating Engineers Employer Bar-

gaining Agency is, in our opinion, essentially a private matter not involving the exercise of government policy or government function. See *Bhindi v. B.C. Projectionists Local 348*, (1986), 29 D.L.R. (4th) 47 (B.C.C.A.); *Ontario English Catholic Teachers Association v. Essex County Roman Catholic School Board*, (1987), 36 D.L.R. (4th) 115 (Ont. Div. Ct.); *Bartello v. Canada Post Corporation*, (1987), 62 O.R. (2d) 652 (H.C.).

25. The Operating Engineers Employer Bargaining Agency is not, in our opinion, an agency of the government. There is not a similar close relationship between the government and the Operating Engineers Employer Bargaining Agency as there was between the Council of Regents and the government which prompted Mr. Justice White in *Lavigne v. Ontario Public Service Employees Union*, (1986), 55 O.R. (2d) 449 (H.C.) to find that the Charter applied to the collective agreement negotiated by the Council of Regents, a delegatee of ministerial authority.

26. The collective agreement before us was negotiated by an employer bargaining agency designated by the Minister of Labour. While the *Labour Relations Act* authorized the Operating Engineers Employer Bargaining Agency to bargain collectively on behalf of the respondent in respect of the industrial, commercial and institutional sector of the construction industry, neither the statute nor any other emanation of government directed that employer bargaining agency in its bargaining. None of the indicia upon which Mr. Justice White relied in reaching the conclusion that he did in *Lavigne* were present in the instant case before us. Additionally, the authority to carry on collective bargaining by the Operating Engineers Employer Bargaining Agency in respect of the sectors of the construction industry other than the industrial, commercial and institutional sector did not derive from the ministerial authority to designate bargaining representatives. Therefore, we find that the Operating Engineers Employer Bargaining Agency is not an agency or emanation of government.

27. Since the respondent in this case does not attack the legislation, but rather argues that the collective agreement is subject to Charter scrutiny, the respondent must persuade us that the collective agreement itself is a manifestation of government activity.

28. In our view, the position of the respondent in this case is virtually identical to the position taken by the applicant in *Tomen v. Federation of Womens Teachers Association of Ontario*, (1987), 61 O.R. (2d) 489 (H.C.). In that case, the applicant challenged a by-law of the Ontario Teachers Federation claiming, among other things that the by-law was contrary to the Charter. In dismissing the application, Mr. Justice Ewaschuk held that the by-law, although arguably having a public aspect, was in essence a private matter among the members of the Federation. His Lordship noted the applicants' argument that there was a public dimension to the by-law at page 502:

"The applicants contended that By-law I is not merely a private law but has a public dimension since it controls the collective bargaining process for elementary and secondary schools through the *School Boards and Teachers Collective Negotiations Act*, *supra*. By this public Act, to which the Charter undoubtedly applies, all teachers are required to bargain collectively with school boards on a local basis through their representative local affiliate. The applicants thus argued that, since By-law I dictates to which of the five affiliates a teacher must belong, By-law I has a public governmental dimension requiring Charter scrutiny."

29. In finding that the by-law in dispute was not subject to the Charter, Mr. Justice Ewaschuk wrote at 506-507:

"The procedure for passing the by-law and its amendment is telling. By-law I is not a regulation approved by the Lieutenant-Governor in Council. Instead, By-law I is a corporate by-law passed by the board of governors to regulate internal membership in the five affiliates of the O.T.F. It is comparable to thousands of by-laws passed in Ontario by voluntary non-profit corporations to govern membership in the particular corporation. By-law I is an internal law passed

by representatives of the teachers of Ontario to regulate membership in the five teachers' affiliates of the O.T.F. Compulsory membership in a particular affiliate is not dictated by the Ontario government, but by the teachers themselves through their appropriate representatives - the board of governors equally representing the five teacher affiliates.

It is therefore abundantly clear that By-law I is a private law devised by teachers to regulate their membership in the five affiliates. Unlike the *Klein* case, *supra*, this private law does not have a public impact. In *Klein*, the Law Society regulated lawyers advertising to the public, and regulated lawyers dealing with the press. Here, the by-law regulates only membership internal to the O.T.F. and its five affiliates. In no way does By-law I have a public dimension.

• • •

Obviously the purpose in passing By-law I was to regulate membership in particular affiliates and not to regulate collective bargaining. It must be remembered that the *School Boards and Teachers Collective Negotiations Act* is not under attack here. Although the latter Act can only be changed by legislative amendment, compulsory membership in the five affiliates can be changed by a simply amendment of the by-law by the O.T.F. board of governors. It is in this sense that By-law I is private law internal to the democratic process of the federation. What the teachers have devised, the teachers may undo by simple amendment. No amendment by the Legislative Assembly of Ontario or by the Lieutenant-Governor in Council is required to remove compulsory membership in one of the five teacher affiliates.

I therefore repeat my conclusion that By-law I is a private law internal to the Ontario Teachers' Federation and its five teacher affiliates.

By-law I is therefore not subject to Charter scrutiny and in particular is not subject to s. 2(d) of the Charter relating to freedom of association nor to s. 15 of the Charter relating to equality rights."

30. It is clear that the collective agreement to which the respondent is bound was negotiated by entities that are not part of government. While it may be that there is some public aspect to the negotiation of the collective agreement, its content flows from collective bargaining, an activity undertaken that does not, in and of itself, constitute a government or public function. As in *Tomen, supra*, legislation is not under attack by the respondent before the Board, but rather it is the collective agreement that is the subject of dispute. The collective agreement, like the by-law in *Tomen, supra*, may be amended by the parties to the collective agreement without reference to the Legislature, the Lieutenant-Governor in Council or the Minister. The collective agreement is, in that sense, a private matter directly affecting only those employers who are members of a constituent employers' organization of the Operating Engineers Employer Bargaining Agency or those employers for whose employees the applicant holds bargaining rights in respect of the industrial, commercial and institutional sector of the construction industry. As we are satisfied that neither of the parties to that collective agreement are manifestations of government, and the function of negotiating a collective agreement is not a public or governmental function, we are satisfied that the collective agreement is not subject to Charter scrutiny.

31. In view of paragraph 3 of the Board's decision in this matter of January 19, 1987, this grievance is to be heard on its merits. As no evidence has been adduced with respect to the merits of this grievance, this panel of the Board is not seized with this matter.

0315-86-M Quality Control Council of Canada, Applicant v. Babcock and Wilcox Canada Ltd., Respondent

Construction Industry - Construction Industry Grievance - Employer arguing that s.124 only available to employees engaged in construction work - Board finding that s.124 encompasses any grievance arising out of any collective agreement between a construction industry trade union and a construction industry employer - Work in this case not covered by collective agreement - Grievance dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *R. M. Sloan* and *H. Peacock*.

APPEARANCES: *A. J. Ahee, J. L. McMahon* and *M. Bakker* for the applicant; *M. Patrick Moran, D. M. Sanderson, J. Griffith* and *R. Takacs* for the respondent.

DECISION OF THE BOARD; December 21, 1988

I

1. This is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*. Section 124 reads, in part, as follows:

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

Section 124 should be read in conjunction with section 1(1)(f) and section 117:

1.-(1) In this Act,

- (f) "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;

...

117. In this section and in sections 118 to 136,

- (a) "council of trade unions" means a council that is formed for the purpose of representing or that according to established bargaining practice represents trade unions as defined in clause (f);
- (b) "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees;
- (c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

- (d) "employers' organization" means an organization that is formed for the purpose of representing or represents employers as defined in clause (c);
- (e) "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector;
- (f) "trade union" means a trade union that according to established trade union practice pertains to the construction industry.

2. For ease of reference, the applicant, the Quality Control Council of Canada, may be referred to either as "the union" or "the Council". The respondent may be referred to as "Babcock & Wilcox". The Non-Destructive Testing Management Association may be referred to either as the "NDT" or "the Association". The agreement between the Council and the NDT will be referred to as the "NDT agreement".

3. In this grievance the Council contends that the respondent has contravened the terms of a collective agreement by which it is bound. In particular, the Council asserts that certain work performed by employees of the respondent at the Pickering Nuclear Generating Station was covered by the NDT agreement, and that, therefore, the employees doing that work should have been union members working in accordance with the terms of that agreement. The Council seeks a declaration to that effect. The respondent concedes that it is bound by the NDT agreement in respect of its "construction" activities, but maintains that it is not bound to apply that agreement to "non-construction work performed in the field". In the alternative, the respondent maintains that the evidence does not establish a breach of the collective agreement, that the union is estopped from asserting its current claim, and that the Board has no jurisdiction to entertain it.

II

4. This matter originally came before a differently constituted panel of the Board. The result was an interim decision dated August 6, 1987 resolving certain issues which the parties characterized as "preliminary". The respondent argued that section 124 is only available to employees engaged in *construction* work (which by statute includes "repair"), and to the extent that the activities underlying a particular grievance are not "construction", any alleged contravention of a collective agreement must be pursued through the grievance arbitration procedure in that agreement. The respondent asserted that the expedited process prescribed by section 124 is not available, because section 124 applies only to the construction industry. If the employees are engaged in a mixture of construction and non-construction activities, that portion of their duties labelled "construction" can be pursued under section 124, but that portion classified as non-construction must follow the "private route" mandated by section 44.

5. The earlier panel of the Board held that, at the very least, it had jurisdiction to deal with those activities which, arguably, fell within the ambit of the construction industry; however, the Board also suggested, without finding, that if the parties to a section 124 application met a literal reading of the statutory definition of "union" and "employer" found in section 117, the Board would have jurisdiction to consider the grievance even though some of the work in question might not be characterized as construction work. The Board suggested that so long as the applicant is a "trade union" within the meaning of section 117(f), and the employer operates a business in the construction industry under section 117(c) (albeit not necessarily exclusively so) either party may resort to the expedited arbitration procedure contemplated by section 124.

6. In our view, the interpretation of section 124 suggested by the earlier panel is the correct one. It also makes the most "industrial relations sense". It is often very difficult to distinguish "repair" which is specifically mentioned in the definition of construction industry (see section 1(1)(f)) and "maintenance" which is not - although the practice in the construction industry is to accord them separate legal treatment even when the employees or required skills may be the same. Indeed, one set of functions will often be done in close cooperation or conjunction with the other, by the same tradesman, employing the same craft skills, tools and equipment. It would make for much mischief and procedural uncertainty if a simple problem such as the non-payment of overtime had to be settled in two different forums at once, with the potential for conflicting interpretations of the collective agreement or contradictory notions about what is construction work and what is not. Furthermore, since the Ontario Labour Relations Board is responsible for interpreting and applying the special statutory framework applicable to the construction industry and, at the same time, is the designated arbitrator for collective agreements in that industry, it is both sensible and hardly surprising that section 124 is drafted broadly enough to encompass any grievance arising out of any collective agreement between a construction industry trade union and a construction industry employer. And it is the Board which has the exclusive jurisdiction to interpret and apply the complex statutory provisions which generally underlie construction industry collective agreements.

7. Does this literal application of section 124 to employers or trade unions which meet the literal terms of section 117 "open the floodgates" to claims that could not reasonably have been within the contemplation of the Legislature? Does it lead to anomalous results? We do not think so. Since unions which meet the test of section 117(f) are almost invariably craft unions confined to their historic craft units, it is most unlikely that they will have collective agreements entirely unrelated to their construction industry base. For example, it is unlikely that the Boilermakers' Union would find itself representing the clerical employees of a construction industry employer. But even if it did, what would be the result: access to an arbitration process which is far faster and cheaper than that contemplated by most "industrial" collective agreements, with the added advantage of a Board-appointed Labour Relations Officer to assist the parties to resolve their differences without recourse to litigation. Thus, the interpretation suggested by the earlier panel of the Board is not only attractive from the perspective of labour relations policy, but also provides aggrieved parties (employers or trade unions) with an expeditious and relatively inexpensive method for resolving their disputes. When weighed against the respondent's suggestion of bifurcated proceedings and potentially competing forums, we prefer an interpretation which makes section 124 available to any union or employer that meets the section 117 requirements - whether or not the work in question, or some of it, is properly regarded as "construction work". (See, generally: *Caroll Electric (1982) Limited*, [1983] OLRB Rep. Aug. 1282.)

8. We should make it clear, however, that in concluding that section 124 is broadly available to construction industry employers and unions, we do not decide whether any particular work falls within the ambit of those collective agreements, nor whether such agreements are confined solely to construction work. That is a matter of interpretation of the agreement itself, and lies at the heart of the matter currently before us.

III

9. Before turning to the events which precipitated this grievance, it may be useful to sketch in some of the factual and contractual background - beginning with a description of "non-destructive testing". Such description can be found in a decision of the Board dated January 26, 1983:

8. The purpose of non-destructive testing is to find cracks in metals. These cracks result from

the stresses created in metal during welding operations or from simple metal fatigue after extended use. As the name implies, non-destructive testing involves testing without destroying the material being tested, and therefore, it uses a variety of techniques such as radiography (similar to X-ray techniques), ultrasonic analysis, iron filing patterns and penetrating dyes. These techniques disclose cracks or faults in the material. The tools used include portable X-ray cameras, portable ultrasonic devices, portable materials for magnetic particle or liquid penetrant analysis, mobile dark rooms for developing X-rays and specialized vehicles to transport these tools, including the transporting of certain radio-active materials. Non-destructive testing work performed on construction projects includes work on pipelines, gas plants, petro-chemical installations, heavy water plants, oil sands plants, reconstruction of pulp mills, refineries and mining installations, bridge construction, dam construction, watermain and subway construction. Obviously, the work is very specialized and the testing contractor is only on a construction job site for very specific times during which the testing of the materials can be performed.

(See *NDT Management Association and Quality Control Council of Canada*, [1983] OLRB Rep. Jan. 140.) That decision also traced the history of the applicant, and the origins of the collective agreement upon which it now relies:

9. The jurisdiction over non-destructive testing work has been claimed by both the United Association and the Boilermakers' Union. The claim by the United Association relates to piping systems whereas the claim of the Boilermakers relates to the testing on pressure vessels. Given the nature of the specialized business of non-destructive testing employers, it is easy to see that on a job site which involves both piping systems and pressure vessels, these two historical claims by the two trade unions could lead to extensive and complicated jurisdictional claims being made by each of the two unions claiming jurisdiction in this area. Thus, by forming a council, the respondent, Quality Control Council of Canada, the two unions claiming jurisdiction have eliminated the possibility of jurisdictional disputes arising over the performance of particular work by the two constituent trade unions. Indeed, apparently half of the employees of an employer join the United Association and the other half join the Boilermakers. However, they all work without restriction on either piping or pressure vessels. There are two other important characteristics of the non-destructive testing industry and the collective agreement upon which this application is made. First, it is the undisputed position of the applicant in this matter that new employees are not hired through the union hiring halls of either of the constituent trade unions in the council of unions. Rather, employees tend to be trained specifically in the skills of non-destructive testing. In accordance with this they are required to pass tests set up by the Canadian Standards Bureau in radiography and ultrasonics. These skills are not typically skills exercised by the trades which claim the work, but are quite clearly specialty skills learned as employees of a non-destructive testing company. The other important characteristic is that the collective agreement itself is not an agreement which refers to or picks up terms of other collective agreements. Rather, it is in fact a specialty agreement which is negotiated by the parties to that agreement and sets specific wage rates for the classifications of non-destructive testing technicians of various qualification....

10. In view of the foregoing history and explanation of the background up to the present period, we are of the view that the request by the applicant to describe the unit of employers as all employers of non-destructive testing technicians, trainees and helpers is indeed an appropriate way of describing those affected by this application. In so doing we are not creating a new craft "unit" for the construction industry. That decision can only be made by a panel of the Board dealing with an application for certification for the employees of an employer in the non-destructive testing industry.

10. The *NDT Management* case mentioned above was an application for accreditation in which the Association was ultimately accredited as the exclusive bargaining agent, *in the construction industry*, for the non-destructive testing employees of a number of employers. Babcock & Wilcox was included among them. The work in question is described in the NDT agreement as follows:

2.01 This Agreement shall apply in respect of all non-destructive testing work performed by the Employer or by any person, firm or corporation owned or financially controlled by the

Employer in Canada. Non-destructive testing includes ultrasonics, radiography, magnetic particle, dye penetrant, and eddy current, but does not include visual inspection or destructive testing unless the Council or one of its affiliated Unions gains certification or written voluntary recognition for the visual inspectors of an employer, in which case the Employer, through the NDTMA (if an NDTMA member), will negotiate rates for his visual inspectors and include them under this Agreement.

11. For the purpose of this case however, it is important to note that Babcock & Wilcox is not now and never has been a member of the Association, nor has Babcock & Wilcox ever authorized the Association to bargain for it outside of the construction industry. Babcock & Wilcox is primarily a manufacturer. It is occasionally engaged in the construction industry, but not exclusively so. Accordingly, bargaining or contractual rights held by the applicant (or indeed any other union) outside the construction industry must be based upon either certification or voluntary recognition. The accreditation order cannot, in itself, extend bargaining rights beyond the company's construction activities.

IV

12. Babcock & Wilcox is a major manufacturer of boilers and heat exchange systems with production facilities at Cambridge, Ontario. The company is also engaged in the installation repair, rebuilding and periodic testing of those systems. It employs a number of technicians who use a technique known as "eddy current testing" to check for faults in the piping systems of heat exchangers. By electronic and magnetic means these technicians can gauge the thickness of the tubing and detect cracks or splits. Some of these technicians work "in the field" in conjunction with the company's "construction group" installing or repairing the company's equipment. Others do not. The issue raised in this case is whether all eddy current testing done "in the field" falls within the ambit of the Quality Control agreement - whether or not the technicians are using that technique in conjunction with construction activities or are part of the employer's construction operations group.

13. The union's bargaining rights can be traced to a document executed on June 13, 1980 which reads as follows:

WHEREAS part of the Employer's business involves non-destructive testing and the employment of persons skilled and qualified to perform the same;

AND WHEREAS the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (hereinafter referred to as the "affiliated Unions") shall negotiate and administer this Agreement through the Council and shall empower it to act as agent for each and both of them;

AND WHEREAS the Council is party to a collective agreement for the period December 1, 1978 up to and including November 30, 1980 with the NDT Management Association and certain non-destructive testing companies signatory thereto (hereinafter called the "NDT Agreement");

NOW THEREFORE this Agreement witnesseth that: Article 1.01 of the NDT Agreement is modified as follows:

1. The Employer recognizes the Council as the sole and exclusive bargaining representative for all Non-Destructive Testing Technicians, Trainees and Helpers *in the employ of the Employer's Construction Operations* within the scope of the NDT Agreement save and except office and sales staff, persons above the rank of working supervisor and persons covered by any subsisting collective agreement between the employer and trade union other than an affiliated union.

2. The Employer agrees, except as otherwise provided in this Agreement, to be bound by the terms and conditions contained in the articles of the NDT Agreement, attached hereto as Appendix "A".

3. Article 3.02 of the NDT Agreement shall not apply to employees engaged by the Employer prior to the date of this Agreement.

4. Employees shall continue to receive the Health and Welfare benefits provided by the Employer immediately prior to the date of this Agreement up to and including the 30th day of September, 1980. Accordingly, the provisions of Article XVI: Health and Welfare shall not apply until the 1st day of October, 1980.

5. All parties agree that the procedure for the transferring of Babcock & Wilcox Canada Ltd. employees will be in accordance with the Memorandum of Understanding (Attachment NO. 1) attached hereto.

DATED at Cambridge, Ontario, this 13th day of June, 1980.

The employer agrees, with some reservations and exceptions, to abide by the terms of the NDT agreement. The exceptions are important in our view because, while Babcock & Wilcox is recognizing the union and generally prepared to apply industry standards, it is also preserving its own individual relationship with the applicant.

14. Two further documents were put in evidence: one preceding and one following the above-mentioned voluntary recognition agreement. Both are letters over the signature of J. R. Ashton, then Manager of Employee Relations. In a letter dated April 8, 1980 to various union officials he said:

It is our understanding that the Council and the Affiliated unions are not concerned about our manufacturing operations in Cambridge and understand that they are represented by the United Steelworkers, therefore, *the recognition and scope will only apply to the company's construction operations.*

A letter dated July 9, 1980 reads as follows:

Mr. J. Russ St. Eloi

Director of Canadian Affairs
United Association et al
Suite 702 - 310 Broadway
Winnipeg, Manitoba
R3C 0S6

Dear Sir:

This letter will clarify item #1 of our Agreement with the Quality Control Council of Canada which refers to Article 1.01 of the N.D.T. Agreement.

The scope of the Employer's Construction operations referred to in item #1 of the above stated agreement shall include New Construction, Repair, Revamp and Maintenance Work performed by the Employer's Construction operations in the field.

Later recognition agreements dated September 14, 1981 and May 2, 1983 reproduce without alteration Article 1.01 of the original recognition arrangement and again preserve certain terms and conditions of employment which are different from those appearing in the NDT agreement.

15. By letter dated January 15, 1981 Mr. Ashton responded to a complaint that the company was not complying with the agreement. The letter contained the following passages:

The company at the present time does not have a large staff of quality control technicians in the Construction Department. This is due primarily to the fact that we do not have any long-term construction projects on the go in Canada. Our Canadian work load is pretty well made up by strictly repair and revamp work, therefore, we are presently carrying two quality control technicians ... and both of these technicians are members of the Quality Control Council of Canada ... the difference in our contract is simply the recognition clause which recognizes the Council as the bargaining agent for our quality control technicians in our construction operations. This must be obvious to you because if we had accepted the recognition clause as set out in the N.D.T. Agreement, it would not exclude our shops ... as you can see with the exception of specifying our construction operations in the recognition clause, and the memorandum of understanding which allowed us to transfer people from staff to the bargaining unit, B&W do not have any other special arrangements under the collective agreement, therefore, B&W should be allowed to operate as any other contractor signed to the quality control agreement ...

In summary, B&W Canada is operating in its construction operation in accordance with the agreement signed with the Council on the 13th day of June, 1980. The company's staff of quality control technicians in the construction operations involves only two men who are not supervisors or on international assignments. Our construction operations are presently running with only these two people because of the workload in Canada, but when more technicians are required for short-term projects, these technicians will be augmented by subcontract personnel who are members of the Quality Control Council of Canada.

This passage draws a distinction between the "shop" and the company's "construction operations" - as do the various agreements.

16. The union urges us to find that these documents, when read together, demonstrate an intention and oblige the company to apply the quality control agreement to all testing work done by NDT technicians engaged "in the field" whether or not their activities would be characterized as "construction work". The applicant asserts that its agreement with Babcock & Wilcox is not limited solely to construction operations. The applicant concedes that its agreement does not cover NDT technicians working in the shop.

17. The company argues that the NDT agreement only applies to its construction operations. NDT technicians who do eddy current testing as part of other departments (the company mentions its "heat exchanger services group") which are not part of construction operations are not covered by the collective agreement. Counsel submits that if the agreement was intended to cover all NDT work done "in the field" or "away from the shop" it would have been easy to say so. The parties did not. The agreement is restricted to technicians working in the company's construction operations. It has not been extended beyond the ambit of the original recognition provision or subsequent accreditation order.

V

18. This grievance was filed when an official of the applicant heard, indirectly, that eddy current testing was being done by employees of the respondent at the Pickering Nuclear Generating Station; however, because the generating station is operational and not a construction site he was unable to personally verify that this was the case. A company official admitted to him that eddy current testing was being done at Pickering, but we have no direct evidence about what the technicians were doing or why. There is no evidence that they were part of, or working in conjunction with, the respondent's "construction operations", and the company's submission is that they were not. There is no evidence that they were doing new construction, repair, revamp or maintenance work performed by the employer's construction operations "in the field"; nor do we know what Mr. Ashton may have meant 8 years ago by the word "*maintenance*" performed by the employer's *construction* operations in the field. We have no direct evidence concerning the deployment of NDT technicians in the field, the extent to which they were engaged in non-construction

activities, or how they were treated for collective agreement purposes. All that we know, is that a company official (who was not called as a witness) told a union official that some eddy current testing was being done at Pickering.

19. In this case the union bears the onus of establishing its interpretation of the collective agreement and that the collective agreement has been contravened. On balance, we do not think that it has done so. When the pattern of agreements is considered, as a whole, it appears to us that the employer was intending to restrict their application to its construction operations group, or at the very least to what is commonly considered construction work. The agreements do not, by their terms, cover all NDT technicians working away from the shop or all work of the kind described in the NDT agreement under whatever circumstances such testing might be done. Had the parties intended that result, language could have been drafted fairly easily to accomplish it. Moreover, as we have already mentioned, we have no direct evidence about what the NDT technicians were actually doing or what Mr. Ashton might have meant (assuming, without finding that it would be significant) by his use of the term "maintenance" in his letter of July 9, 1980. And we do not even know what the work in question was, except that it involved a diagnostic technique known as eddy current testing.

20. On the balance of probabilities we are not satisfied that the applicant has established a breach of the collective agreement. The grievance must therefore be dismissed.

1187-88-R Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant v. Careful Hand Laundry and Dry Cleaners Limited, Respondent v. Group of Employees, Objectors

Certification - Natural Justice - Request by employer that panel disqualify itself on the basis that there was a reasonable apprehension of bias - Chair making remark about the evidence to that point in the hearing - Board discussing objective test - Request denied

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. W. Pirrie* and *C. McDonald*.

APPEARANCES: *S.B.D. Wahl* and *F. DaSilva* for the applicant; *Stephen A. McArthur*, *Sidney H. Chelsky* and *Brenda Chelsky* for the respondent; *Jennifer Dailey* for the objectors.

DECISION OF THE BOARD; December 16, 1988

1. This decision deals with the request by Careful Hand Laundry and Dry Cleaners Limited ("Careful" or "the employer"), the respondent in this application for certification, that this panel of the Board disqualify itself from continuing to sit on this matter on the basis that there is a reasonable apprehension that the chair of the panel would be biased in determining the issues in dispute.

2. This certification application is brought by Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 ("the union") with respect to certain of the employees of Careful. There was filed with the Board a statement of opposition to certification of the union ("the petition"), and a document affirming support for the union

("the counterpetition"); the overlap in relevant signatures between and among the membership cards filed by the union, the petition and the counterpetition is such that the petition is relevant to these proceedings, but the counterpetition is not relevant. As a party to these proceedings, the representative of the objecting employees has been present throughout and has participated in the proceedings as she saw fit. On the first day of hearing (before a different panel), the employer brought an allegation that an employee who had signed a membership card and confirmed on it that she had paid one dollar to the union for membership fees had not in fact paid the dollar ("the first non-pay"); three other non-pay allegations were raised by the representative of the objecting employees before this panel ("the second", "the third" and "the fourth non-pay"). In addition, the union and the employer have brought allegations of unfair labour practices against each other and the union has made an application under section 8 of the *Labour Relations Act*.

3. A Labour Relations Officer was appointed to inquire into the first non-pay allegation and report back to the Board by a different panel of the Board which also dealt with certain other preliminary matters (see Board decision dated September 23, 1988); at that time also, an Officer met with the parties who reached agreement on the bargaining unit description and who were given "the count", that is, that the union has filed membership evidence purporting to show the support of over 55% of the employees in the bargaining unit. As a result of the Officer's inquiry, the first non-pay allegation was set down for hearing by this panel which unanimously dismissed it (see decision dated October 19, 1988). During the hearing of that allegation, the representative of the objecting employees raised the second, third and fourth non-pay allegations. After the Board authorized a Labour Relations Officer to conduct the usual inquiry (see the October 19th decision), those allegations were set down for hearing by this panel to be heard together. As a result of the demeanour while on the witness stand of the individual who was said not to have paid one dollar, the parties agreed that the second allegation of non-pay should be withdrawn and it was. The Board then heard the evidence of the third and began to hear that of the fourth individual who was alleged not to have paid one dollar. It was during the evidence of the fourth individual, Chivonne Peniston, that the issue addressed in this decision arose.

4. In accordance with its usual procedure in hearing non-pay allegations, the Board first questioned Ms. Peniston. Counsel for the union then had an opportunity to question her and during that process asked her about her involvement in the counterpetition (such questions were allowed in light of the circumstances of this case and the secrecy of the other names on the counterpetition was maintained). Counsel for the employer objected to a particular line of questioning which union counsel claimed was relevant to a possible explanation of Ms. Peniston's denial that she had signed the counterpetition, and in the process of discussion of that objection, the chair suggested to him that there was no doubt that it was Ms. Peniston's signature on the counterpetition, and that he would obviously have the opportunity to examine the relevant material and question the witnesses accordingly on it. It should be noted at this point that, as the parties were aware, the Board had before it documentary evidence in various forms of what purported to be Ms. Peniston's signature: three times on the membership card (which Ms. Peniston testified she had signed), once on the document filed as her "specimen signature" by the employer (which had not been put to her), once on the petition (which she said she had signed) and once on the counterpetition (about which her own testimony was in total inconclusive). Normally, such evidence is not seen by the parties or by all the parties because of the protection the legislation and the Board grant to membership evidence. In this case, however, the chair had advised counsel that he would have an opportunity to view those documents. There was no further discussion at that point since, as a result of a comment by another member of the panel about the signature, the panel recessed. In the event, the recess was lengthy, the panel taking advantage of the opportunity to consider some matters of concern to it, in part relating to the signature, and as a result of those considerations the panel determined to adjourn the hearing until the early afternoon. After the panel returned to the

hearing room, counsel for the employer advised that he had a motion to bring that the comment of the chair prior to the recess, that there was no doubt that it was Ms. Peniston's signature which appears on the counterpetition, constitutes the basis for an apprehension of bias. The arguments of counsel for the employer and the union on that motion were heard after the extended lunch break; the representative of the objecting employees chose to make no submissions on the matter. We note that neither at this time nor by the end of hearing for the day did the Board determine the admissibility of the evidence which union counsel had sought to adduce; the objection to its admissibility remains outstanding.

5. Counsel for the union argued that for the motion to succeed, employer counsel must show that there was a predisposition on the part of the chair prior to or at the time of coming to these proceedings, evidenced by an event arising in the course of the proceedings (employer counsel does not make such an allegation). We reject that proposition; in our view, allegations of bias or apprehension of bias can arise during proceedings regardless of whether it can be traced to any predisposition prior to or at the start of the hearing. We also reject his proposition that the applicable test differs, depending on whether the matter arises at the commencement of the hearing or during the hearing.

6. The applicable test was framed as follows by Laskin C.J.C., speaking for the majority, in *Committee for Justice and Liberty v. National Energy Board* (1976), 68 D.L.R. (3d) 716 (S.C.C.): that a reasonably well-informed person could properly have a reasonable apprehension of a biased appraisal and judgment of the issues to be determined (p.733). The Chief Justice continued that "the test of reasonable apprehension of bias ... [is a restatement of] what Rand, J. said in *Szilard v. Szasz*, [1955] 1 D.L.R. 370 at p. 373, [1955] S.C.R. 3 at pp. 6-7 [which, like the *Committee for Justice and Liberty*, involved bias based on prior association], in speaking of the 'probability or reasoned suspicion of biased appraisal and judgment, unintended though it be'".

7. The test is an objective one. It is not sufficient to find apprehension of bias in a decision-maker simply because one party states "I am afraid the adjudicator will be biased because of something she said"; on the other hand, it is not sufficient for the adjudicator to deal with the matter simply by saying "I am not biased" or "I do not think anyone should think I would be biased". An objective test is necessary to avoid both allegations and determinations which are more reflective of self-interest than actuality. The determination must therefore be based on an assessment of the impugned words, including the context in which they were made and the surrounding statements. The test is whether a person who is informed about the circumstances surrounding the event giving rise to the allegation could have a reasonable apprehension that the adjudicator will not or will not be able to determine the matters in issue in a manner consistent with providing a fair and impartial hearing.

8. Counsel for the employer stated clearly and unequivocally that he was not asserting that the chair had made a determination or had made up her mind about Ms. Peniston's credibility. He conceded that he was not alleging that favouritism to any party was inherent in the chair's comment, but rather that after the panel recessed, he, his student and the employer looked at each other and said "we're cooked; we are not going to get a fair hearing"; he expressed "the fear that what [he] say[s] or do[es] from this time on is not going to matter". He explicitly confined his concern to the remark about the signature on the counterpetition which he variously termed "an unalterable conclusion", "a prejudgment of fact", and "an unequivocal decision". Whether Ms. Peniston is found to have signed the counterpetition, he further submitted, constituted a critical factor going to her credibility (he suggested that if the Board were prepared not to make it a critical factor, matters might be different, but he could not see how the Board could honestly do that). He submitted that the Board had made a conclusion without objecting employees or the employer

having a chance to deal with the matter by calling evidence, seeing the documents or calling a handwriting expert. He discounted the significance of the statement which followed immediately upon the chair's remark, that he would have an opportunity to deal with the question and see the relevant materials. It is not, in our view, reasonable to conclude that the chair would at the same time make a statement relating to the evidence and assure counsel that he would have an opportunity to deal with all the relevant evidence and then ignore whatever counsel placed before the panel. A more reasonable inference is that the chair had reached a preliminary conclusion but was open to changing or tempering it in light of any additional evidence led by any of the parties.

9. Counsel for the employer relied primarily on two cases: *Re Gooliah and Minister of Citizenship and Immigration* (1967), 63 D.L.R. (2d) 224 (Man C.A.) (in which the allegation was of actual bias) and *Re Golomb and College of Physicians and Surgeons of Ontario* (1976), 68 D.L.R. (3d) 25 (Ont. Div. Ct.). In each case, the reviewing court found that the impugned proceedings from beginning to end were characterized by conduct leading to a reasonable apprehension of bias or of actual bias. Apart from ruling, without objection from the parties, on one further matter, in light of the lateness of the hour, the proceedings were adjourned. There is therefore nothing subsequent to assess in the manner in which the proceedings were assessed in *Re Gooliah, supra*, or *Re Golomb, supra*. However, counsel raised no objection to any of the proceedings prior to the impugned comment and specifically limited his objection to that comment.

10. The situation before us is thus quite different from any which occurred in the cases cited to us in which there has been a finding of apprehension of bias. In this case, the objection is to one comment made by the chair in the context of an objection raised by one party with respect to evidence adduced by the other. During hearings it is common to deal with objections in an informal manner; many objections are resolved without the necessity of rulings by the Board because of the parties' agreement on the way to proceed or because of the withdrawing of the objection or of the questions or documents from consideration. In the course of such informal discussions, the Board may make comments indicative of the trend of the evidence to that point; indeed, it may do so at times on its own initiative if it considers it appropriate to do so. Such comments may also be offered as a way of indicating to the parties the Board's view of the evidence *to that point in time* or of communicating to them concerns the Board may have about the issues being raised. Indeed such comments may be at times desirable in achieving a fair hearing since an element of fairness is that the hearing not be unduly prolonged by the unnecessary calling of extensive and/or unfocussed evidence on peripheral or minor issues; this issue in our view, as only one factor possibly going to credibility, may be so characterized. On a fair and reasonable consideration of the circumstances, the comment made by the chair to employer counsel would be understood to have been made in that spirit. The chair has no hesitancy in stating that she has not reached a final or unalterable decision on the point in dispute. More important, however, an objective assessment of the circumstances clearly demonstrates that the remark was made by the chair on the basis of the evidence to that time, including the documentary evidence before the Board, to indicate that in at least the chair's view, counsel might have a difficult time in counteracting the evidence then before the panel. But "difficult" is not impossible; a message to counsel that the road may be a difficult one is not synonymous with a statement reflecting conviction beyond persuasion to the contrary.

11. For these reasons, we conclude that a reasonably well-informed person would not properly have a reasonable apprehension that the chair (or any member of the panel) would appraise and reach conclusions on the issues to be determined in a biased manner without giving the parties a fair and impartial hearing. There being no merit to counsel's objection to our proceeding, the hearing will continue on January 20, 1989, as previously scheduled.

12. During the recess referred to in paragraph 4 above, the panel had an opportunity to do

an additional check of the documentary evidence in the file. That review revealed some “doubtful signatures”: signatures on cards which did not appear to be the same as the corresponding specimen signatures filed by the employer. It appeared that the Board had not yet done the usual investigation into these cards. Accordingly, the Board appointed a Labour Relations Officer to inquire into the “doubtful signatures” and report back to the Board. As result of the Officer’s investigation, the Board will inquire into whether the following two individuals did sign the cards filed by the union purporting to be evidence of their membership in the union: Sonia Jackson and Ana Barreiros. Accordingly, that matter is added to the issues to be heard by the Board when hearings into this application recommence on January 20, 1989. Pursuant to its usual practice, the Board will call as witnesses the two individuals purported to have signed the relevant cards, the collector, Jim Amos, and the Form 9 declarant, Carlos Aedo, who is already under subpoena to testify with respect to the “non-pay” allegations.

1693-87-R Labourers’ International Union of North America, Local 1089, Applicant v. Catalytic Maintenance Inc., Respondent

Certification - Membership Evidence - Membership cards signed after workers’ employment was terminated but before terminal date given no weight - Vote ordered

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

DECISION OF THE BOARD; December 5, 1988

1. This is an application for certification. The matters in dispute have already been set out in two earlier decisions of the Board; but, for ease of exposition, we will repeat them here. The facts are not in dispute.

2. The respondent employer, as its name suggests, is engaged in the industrial maintenance business. The applicant union has applied for certification as the bargaining agent for certain of the respondent’s employees, in an agreed bargaining unit framed as follows:

All employees of the respondent at the Polysar Limited, Corunna site, at Corunna, Ontario, save and except foremen, persons above the rank of foreman, office, clerical, technical, engineering and sales staff, and persons for whom any trade union had bargaining rights on September 21, 1987.

3. Following the application for certification, the Board appointed an Officer to inquire into and report upon the employee list and the composition of the bargaining unit. In particular, the Officer was authorized to inquire into the number and identity of the employees on the application date, and the date when they terminated their employment with the respondent. The Officer was so authorized, because in at least two instances, a perusal of the union’s membership evidence suggested that membership cards were signed *after* the worker’s employment was terminated. The Board drew the parties’ attention and requested representations with respect to the application of the policy enunciated in: *Hardman Industries Limited*, [1982] OLRB Rep. Mar. 388, and *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840.

4. After a meeting with the Labour Relations Officer, the parties verified and agreed that two individuals had signed union membership cards after their employment with the respondent was terminated. On their last day worked, they were told by a managerial employee of the respondent that they would be laid off *permanently* at the end of the day, and they were in fact permanently laid off. It was only after this permanent severance of employment that they signed union membership cards. However, these two membership cards are numerically significant. They were signed *before* the "terminal date" fixed pursuant to section 102(3)(j) as the time for ascertaining membership for the purposes of section 7 of the Act. Given the arithmetic requirement of section 7 for support among more than fifty-five per cent of the employees in the bargaining unit, it is apparent that if these two cards are "counted", the trade union is in a position to be certified without recourse to a representation vote, and if they are not counted, a representation vote will be necessary.

5. Essentially, then, the issue is this: in a certification application designed to establish a continuing collective bargaining relationship with a particular employer, should the Board give any weight to membership evidence signed by individuals after they have severed their employment relationship with the respondent and cannot, in any meaningful sense, be considered "employees in the bargaining unit". In our view, the answer is no; moreover, that view is entirely consistent with the Board's established practice of some 20 years standing. Even if we are wrong, we would not be disposed to issue a certificate, without the confirmatory evidence of a representation vote, where the union's entitlement to "automatic certification" depends upon the membership cards of workers who were no longer employees of the respondent at the time those cards were signed. Our opinion is consistent with, and we adopt, the opinion of the Board in *Hardman Industries Limited*, *supra*.

6. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 2, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. A representation vote will be taken of the employees of the respondent in the bargaining unit. All those employed in the bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.

8. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

9. The matter is referred to the Registrar.

1363-87-R; 1928-87-U Retail, Wholesale and Department Store Union, AFL:CIO:-CLC:, Applicant v. **Cuddy Food Products Ltd.**, Respondent v. United Food and Commercial Workers' International Union, Local 175 and United Food and Commercial Workers' International Union, AFL-CIO-CLC, Interveners; John Henson and 25 others, Complainants v. United Food and Commercial Workers' International Union, AFL-CIO-CLC, United Food and Commercial Workers' International Union, Local 175 and Cuddy Food Products Ltd., Respondents; Deb Johnston and others, Interveners

Abandonment - Bargaining Rights - Bargaining Unit - Certification - Collective Agreement - Duty of Fair Representation - Ratification and Strike Vote - Remedies - Unfair Labour Practice - UFCW having municipal-wide bargaining rights - Employer opening up new plant in municipality - Employees in new plant told by employer they were not represented by a union - Union not consulting employees in new plant before concluding collective agreement with terms and conditions of employment alleged to be inferior - Motion brought by RWDSU to set aside collective agreement dismissed - Employees at new plant initially covered by collective agreement at old plant - Parties free to divide unit in two - Division of unit not resulting in abandonment of bargaining rights - Employees at new plant not participating in strike or ratification votes at old plant - Even if technical breach of s. 72(5), no remedial response warranted - Union breaching fair representation duty by failing to consult employees at new plant before concluding agreement and by failing to conduct a ratification vote - Whether Board has jurisdiction to set aside collective agreement as a remedy where employer not found to have violated the Act - Damages awarded but Board declining to exercise jurisdiction to set aside agreement - Certification application of RWDSU dismissed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *David J. Jewitt* and others for Retail, Wholesale and Department Store Union and the complainants in Board File 1928-87-U; *Paulene C. Pasioka*, *George Root* and *Bob Paterson* for Cuddy Foods Products Ltd.; *Douglas J. Wray* and *Don Dayman* for United Food and Commercial Workers' International Union, Local 175 and United Food and Commercial Workers' International Union, AFL-CIO-CLC; *Christopher Bentley*, *Debra Crane* and *Geoff Smith* for the interveners in Board File 1928-87-U.

DECISION OF THE BOARD; December 9, 1988

1. In 1986, Cuddy Food Products Ltd. ("Cuddy") announced that it would be building new facilities ("the Cuddy Boulevard facilities") at what later came to be known as 10 Cuddy Boulevard in the City of London. Newly-hired employees began work there in late March and early April, 1987. At the time of their hiring and at other times thereafter, employees at this plant were told by members of Cuddy's management that they were not represented by a union. In August 1987, the then approximately 400 employees at the Cuddy Boulevard facilities received an invitation, posted on company bulletin boards, to attend a meeting with the union which represented the employees ("the Trafalgar Road employees") at Cuddy's other facilities at Trafalgar Road in the City of London. Many of them did. They were then told, for the first time, that that union claimed the right to represent them and had concluded a collective agreement which would govern their wages and working conditions for the next two years. This news was not well received. Many employees at the Cuddy Boulevard facilities (the "Cuddy Boulevard employees") then turned to the Retail, Wholesale and Department Store Union ("RWDSU"), which quickly signed about 80 per cent of them into its membership.

2. On August 20, 1987, RWDSU filed an application under the *Labour Relations Act* ("the Act") for certification with respect to the Cuddy Boulevard employees (Board File No. 1363-87-R). Cuddy replied that the application was untimely because the affected employees are covered by a collective agreement ("the Cuddy Boulevard agreement") between it and United Food and Commercial Workers' International Union, Local 175 ("Local 175"). The same claim was made in an intervention which was initially filed in the name of "United Food and Commercial Workers' International Union, AFL-CIO-CLC on behalf of Local 175". (The title of these proceedings was amended on the first hearing date at the request of the interveners to show that both the UFCW and its Local 175 were intervening.) RWDSU asserted that the Cuddy Boulevard agreement should be set aside under section 60 of the Act, arguing that it was a first collective agreement which granted voluntary recognition to a trade union which had not been certified to represent the affected employees and did not enjoy majority support among those employees at the time the agreement was made. In answer to those assertions, the respondent and interveners alleged that Local 175 had bargaining rights with respect to the affected employees under a collective agreement dated August 9, 1985 between Cuddy and "United Food & Commercial Workers International Union, AFL-CIO, CLC on behalf of Local 175 United Food & Commercial Workers International Union, Region 18, AFL-CIO, CLC" which had covered all employees of Cuddy in the City of London with certain exceptions not material to this dispute.

3. Before the Board began hearing the certification application on its merits, 23 Cuddy Boulevard employees filed a complaint under section 89 of the Act in which they alleged that Local 175's acts and omissions in relation to the Cuddy Boulevard agreement violated section 68 of the Act and asked that the agreement be set aside as a remedy for this breach if it could not be set aside under section 60 in the course of the certification proceedings. We determined that this panel would hear both the certification application and the complaint, that our hearing of evidence and argument with respect to issues relevant only to the complaint would be deferred until after hearing all relevant evidence and argument with respect to whether the Cuddy Boulevard agreement would be set aside under section 60 of the Act and that evidence heard in that connection would later be applied, to the extent relevant, to the determination of the complaint.

4. In the first phase of our hearings in this matter we heard the parties' evidence and argument with respect to the section 60 issue. On November 27, 1987, we ruled orally that the Cuddy Boulevard agreement would not be set aside under section 60. Thereafter, our hearings focused on the complaint. The hearing of the parties' additional evidence and argument with respect to the complaint is now complete. Before addressing the complaint, we will set out the facts relevant to our oral ruling of November 27, 1987, together with our reasons for that oral ruling.

I

5. On November 15, 1978, the Board certified the Amalgamated Meat Cutters and Butcher Workmen of North America ("the Amalgamated Meat Cutters") as exclusive bargaining agent for a unit consisting of:

All employees of Cuddy Food Products Limited in the City of London, save and except retail employees, foremen, foreladies, persons above the rank of foreman or forelady, office and sales staff, students employed in school vacation period, and persons regularly employed for not more than twenty-four hours per week.

Cuddy's only London operation at that time was a plant on Trafalgar Road which it had taken over in the late 1970s. On February 7, 1979, Cuddy entered into a collective agreement with Local P1105, Canadian Food and Allied Workers, chartered by the Amalgamated Meat Cutters and

Butcher Workmen of North America (“Local P1105”). That agreement contained the following recognition provisions:

ARTICLE 2 - RECOGNITION

2.01 The Company recognizes the Union as the exclusive bargaining agent for all employees of it's [sic] plant as defined in Article 3.

ARTICLE 3 - EMPLOYEES

3.01 The term “employees” as used in the Agreement shall be all employees of Cuddy Food Products Limited in the City of London, save and except: retail employees, foremen, foreladies, persons above the rank of foreman or forelady, office and sales staff, students employed in school vacation period, and persons employed for not more than twenty-four (24) hours per week.

This collective agreement (“the 1979 agreement”) was in effect from February 7, 1979 to February 6, 1981.

6. At some point during the term of the 1979 agreement, Cuddy purchased and renovated the building adjacent (but for an intervening laneway) to its existing building on Trafalgar Road. The old premises continued to be used for the further processing of turkey meat. The new premises were (and still are) used for the further processing of chicken meat as a supplier to McDonald's Restaurants. The old building came to be known informally as “plant A”, while the new facilities were known as “plant B”. The operations carried on in those respective buildings were referred to in ensuing collective agreements as the “Turkey Processing Division” and “Chicken Patty Division” or “Division A” and “Division B”. No question arose about bargaining rights with respect to employees in the new premises. All of Cuddy's then London operations were covered by a single collective agreement (“the 1981 agreement”) with “United Food & Commercial Workers International Union, AFL:CIO:CLC on behalf of Local 1105P United Food & Commercial Workers International Union, Region 18, AFL:CIO:CLC” (“Local 1105P”) covering the period February 7, 1981 to February 7, 1983. The provisions of Article 2 of that agreement were the same as those of the 1979 agreement. Apart from some changes to the express exclusions which are immaterial to the issues before us, the language of Article 3 of that agreement was also the same as in the 1979 agreement.

7. On January 31, 1983, the Board certified the United Food and Commercial Workers International Union, Local 1105P as exclusive bargaining agent for

“all employees of Cuddy Foods Products Ltd. at London, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed in the school vacation period, save and except truck drivers, foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff”.

This language mirrors the provisions of Article 3 of the 1981 collective agreement. No collective agreement was ever concluded with respect to these part-time and student employees, however.

8. The next collective agreement in time (“the 1983 agreement”) was in effect from February 8, 1983 to February 7, 1985. The parties were the same as the parties to the 1981 agreement and, apart from the addition of “nurses” as an express exclusion in Article 3, the language of Articles 2 and 3 was unchanged. On August 9, 1985, Cuddy entered into a collective agreement (“the 1985 agreement”) with “United Food & Commercial Workers International Union, AFL-CIO, CLC on behalf of Local 175 United Food & Commercial Workers International Union, Region 18,

AFL-CIO, CLC” with effect from February 9, 1985 to February 8, 1987. Articles 2 and 3 of the 1985 agreement were the same as in the 1983 agreement.

9. In the course of these proceedings, the trade union interveners sought a declaration or declarations under section 62 of the Act to the effect that Local 175 (or, in the alternative, the United Food and Commercial Workers International Union) has acquired the rights, privileges and duties of the Amalgamated Meat Cutters, Local P1105 and Local 1105P with respect to the employees of Cuddy in London. In that connection, they asserted that:

- (a) following its certification, the Amalgamated Meat Cutters transferred its bargaining rights for Cuddy employees to Local P1105;
- (b) Local 1105P was the successor to Local P1105 as a result of the 1979 merger between the Amalgamated Meat Cutters and the Retail Clerks International Union to form the United Food and Commercial Workers International Union; and
- (c) Local 1105P merged with Local 175 in 1985.

The object of this claim was to support an argument that Local 175 is, in effect, a trade union which had been certified in 1978 as bargaining agent for a bargaining unit broad enough to include the employees at the Cuddy Boulevard facilities and, accordingly, its 1987 agreement with respect to those employees could not be attacked under section 60 whatever the scope of its bargaining rights may have been under the 1985 collective agreement (see *R. v. OLRB, ex parte Lakehead Registered Nursing Assistants Bargaining Association*, [1970] 2 O.R. 597, 69 CLLC ¶14,181 (Ont. H.C.)). We deferred consideration of this claim until after we had determined whether section 60 was otherwise applicable. In the result, it was not necessary to deal with this claim under section 62.

10. Don Dayman has been a union business representative since 1964. He is currently a business representative of Local 175. Before the alleged merger of Local 1105P with Local 175, he was business representative of Local 1105P. Before the formation of the UFCW, he was business representative of Local P1105 of the Amalgamated Meat Cutters. He was involved in the 1978 certification of the Amalgamated Meat Cutters with respect to employees of Cuddy. He was also involved in the negotiation of each of the collective agreements to which we have referred. He testified that there had been no suggestion during the negotiation of the first of those collective agreements that the language of Articles 2 and 3 in any way narrowed the scope of the bargaining unit for which the Amalgamated Meat Cutters had been certified. Again, after Cuddy began operations in “Plant B”, there had been no suggestion that Local P1105’s then existing bargaining rights did not include that new location.

11. In the summer of 1986, Mr. Dayman read an article in the London Free Press about Cuddy’s plan to build a new plant in London. He then contacted Cuddy’s Director of Personnel, George Root, for more information. In the course of the ensuing conversation, he told Mr. Root that the union believed it would have bargaining rights with respect to the new plant. Mr. Root neither agreed nor disagreed. Mr. Root maintained that non-committal posture on behalf of Cuddy when he and Larry Moss, Cuddy’s Vice-President of Operations, met with Mr. Dayman shortly thereafter to discuss the matter further. Mr. Dayman asked what Cuddy’s plans were for the new plant. He was told that the first operations at the plant would involve the killing and eviscerating of live chickens and deboning of the chicken carcasses; at an undefined point in the future, referred to as “phase two”, Cuddy would move to the new plant nearly all of the operations then

carried on at plant "A"; in "phase 3", Cuddy's corporate offices would be moved to the new location.

12. The killing and eviscerating of live birds was not an operation then carried on in Cuddy's existing facilities in London. Mr. Dayman told Messrs. Root and Moss that an operation of that sort would ordinarily involve job classifications and terms and conditions of employment different in some respects from those which the parties had established in their existing collective agreement. He suggested to them that the new plant be made the subject of a separate collective agreement, and gave them copies of various collective agreements the union had made with other employers with respect to kill operations. At the end of this initial meeting, Messrs. Root Moss told Mr. Dayman they would have to speak to their superiors and get back to him. Mr. Root testified that they did that. It was the confidential opinion of Cuddy's solicitors, he says, that Local 175 would have bargaining rights with respect to the new plant. It was decided, however, that Mr. Root would not expressly acknowledge the union's bargaining rights, but would simply pursue the matter to find out what Mr. Dayman had in mind with respect to a contract and maintain a willingness to bargain. The union was invited to submit its proposals with respect to the new plant. Mr. Dayman's first written proposal was forwarded to the company in December 1986.

13. In the meantime, the union gave notice to bargain for the renewal of the 1985 agreement on December 8, 1986. Union representatives had by then met with Trafalgar Road employees to formulate proposals and select a negotiating committee. Mr. Dayman, John Hurley (another business representative of Local 175) and that employee committee began meeting with Mr. Root and Mr. Patterson, another company representative, on February 3, 1987 to discuss their proposals for the renewal of the existing collective agreement. On either the day before or the day after this meeting, Messrs. Dayman and Hurley met company representatives in the absence of the employee committee to discuss the union's proposals with respect to the new plant. Their discussions with the company about the new plant were thereafter always held separate and apart from the meetings they attended with the employee negotiating committee to negotiate for the renewal of the existing collective agreement.

14. Local 175 applied for conciliation services by request to the Minister dated February 27, 1987. In that request, Mr. Dayman stated on behalf of the union that the affected bargaining unit was "all employees", but where required to list the number and dates of meetings held in an effort to make a collective agreement, he listed only the meetings which the employee committee had attended. A conciliation officer was appointed on March 11, 1987. Meetings with the conciliation officer focused on the matters discussed earlier in meetings at which the employee committee had been present, which included a demand by Cuddy that the words "in the City of London" in Article 3.01 be changed to "1226 Trafalgar Road, London, Ontario". That demand was resisted by Local 175. Discussions about a separate agreement for the new plant remained separate; those matters were not discussed between the parties during conciliation.

15. On March 18, 1987, when he felt the negotiations with respect to the new plant were not going well, Mr. Dayman sent the following registered letter to Mr. Root:

Re: New Plant in London, Ontario

This letter will serve to confirm the Union's position concerning the new plant in London, Ontario. We believe we hold bargaining rights for any employees of the Company in the City of London, based on our certificates and collective agreement. Furthermore, if you attempt in avoid [sic] our bargaining rights by using a different corporate vehicle, we will rely on the provisions of the Labour Relations Act, including *Section 1(4)*, to protect our bargaining rights.

Furthermore, we object to your attempt in bargaining to erode our bargaining rights by propos-

ing a municipal address in the recognition clause. If this position is maintained much longer by the Company, we may be forced to file a complaint of unfair labour practice with the Labour Relations Board.

We are of course prepared to discuss this matter with you in an effort to reach a mutually satisfactory resolution to this situation. Please be advised, however, that any such discussions, past or future, are without prejudice to our position as outlined above.

This precipitated some progress in negotiations from the union's perspective. The threat of filing a complaint with the Board was not carried out.

16. Up to this point, no one was employed at the new Cuddy Boulevard facilities. That changed in late March or early April when newly hired employees began working at that plant. After it learned of this, on April 22, 1987 the union filed the following grievance under the expired 1985 agreement (the terms of which were still in effect by virtue of subsection 79(1) of the Act):

Date of Occurrence: April 20th - ongoing

NATURE OF GRIEVANCE:

The Union hereby grieves on its own behalf and on behalf of the employees it represents that the Company is violating the collective agreement in its entirety at the 10 Cuddy Boulevard, London location.

CONTRACT SECTION(S) VIOLATED:

All articles & clauses.

- REMEDY SOUGHT:
- 1) Declaration of violation.
 - 2) Direction to comply.
 - 3) Compensation to the union and the employees with interest.
 - 4) Any other appropriate relief.

This grievance was never pursued.

17. The office of the Deputy Minister of Labour issued a "no board" report on May 8, 1987. Subsequently (10 days to two weeks prior to June 4, 1987), the union held a meeting to which only Trafalgar Road employees were invited. They were asked whether they wished to accept the company's last offer or go on strike. They voted to strike. Negotiations continued.

18. On June 1, 1987, before the Trafalgar Road employees went on strike, Cuddy and Local 175 agreed orally on the terms of a collective agreement with respect to persons employed by Cuddy at 10 Cuddy Boulevard. This agreement was reached at a meeting which, like all other meetings concerning 10 Cuddy Boulevard, involved no employees of Cuddy. Mr. Dayman would not sign a written version of this oral agreement at that time, however. He gave no reason for this then. The reason he gave in his testimony before us was that he was not sure where the unconcluded negotiations with respect to Trafalgar Road employees were going or "what complications we might get into."

19. Local 175 took the Trafalgar Road employees out on strike on June 4, 1987. Bargaining continued during the strike, and resulted in a settlement which brought the strike to an end on June 19, 1987. The settlement was ratified on June 20, 1987 at a meeting to which only Trafalgar

Road employees were invited. The written terms of the settlement made no provision for alteration of the recognition provisions in Articles 2 and 3 of the 1985 agreement, but both Cuddy and Local 175 say the terms of the settlement only applied to employees at the Trafalgar Road facilities.

20. The Cuddy Boulevard agreement was executed on July 30, 1987. At that time, no formal collective agreement had been signed reflecting the matters agreed to in the memorandum of settlement of June 19, 1987. No such document had been signed when we gave our oral ruling on November 27, 1987; it was not then necessary to consider whether the settlement of June 19th, once ratified, had attained the status of a collective agreement.

21. Messrs. Root and Dayman were the sole witnesses of the respondent and interveners, respectively, in this first phase of the hearing of these matters. Counsel for the applicant (who was also counsel for the complainants) was asked to and did provide (in writing, with oral amendments) the following statement of the facts he expected would be established by the testimony of the witnesses he proposed to call in this phase of the hearing:

CHRONOLOGICAL STATEMENT OF EVIDENCE
TO BE PRESENTED BY RETAIL, WHOLESALE,
DEPARTMENT STORE WITNESSES

1. Tom Collins will testify concerning the certification of Retail, Wholesale in 1986 for East Huron Poultry, a plant owned by the Respondent Cuddy Food Products Limited. Retail, Wholesale negotiated the first collective agreement ever for those employees in the fall of 1986 and during that process became acquainted with Mr. George Root and the Cuddy management team.

2. *March 27th, 1987* - Certain employees commenced work at 10 Cuddy Boulevard and these employees will be called to testify that they were advised by management that the plant that they were going to be working in was a non-union plant. The specific members of management who made these representations were Mr. George Root the General Personnel Manager, Mark Bossy the Personnel Manager for the 10 Cuddy Boulevard Plant, and John Lapin the supervisor at the 10 Cuddy Boulevard Plant. Other witnesses hired throughout April, May and June will also give testimony that they were similarly advised that the plant was a non-union plant at the time of their hiring. Certain of these employees will also give evidence that they began to make inquiries of Retail, Wholesale and Department Store Union (and, later, the CAW) to determine if a union could be brought into their plant.

3. In addition these employees will testify that their salary, benefits and working terms and conditions were separate and at all times inferior to those in the Trafalgar Road plant. There was no interaction or intermingling of employees between the two plants and at all times they were treated as a separate operation with separate management designated specifically to the 10 Cuddy Boulevard Plant.

4. On or about April 15th, Tom Collins had a brief discussion with George Root in a hotel. At this time Mr. Root indicated that he was negotiating with UFCW for the Trafalgar Road or turkey plant collective agreement.

5. Mr. Root specifically indicated to Tom Collins that he was surprised that Retail, Wholesale and Department Store Union had not gone after the 10 Cuddy Boulevard plant, especially as they were considering calling the plant East Huron Poultry. Mr. Root also indicated that at this point in time they were negotiating with UFCW only with respect to the Trafalgar Street plant but that they were going to look into a recognition agreement for the 10 Cuddy Boulevard plant. Tom Collins indicated to Mr. Root that he would contact him later to determine if the plant was going to be called the East Huron Poultry Plant in which case he felt Retail, Wholesale might have some claim to the work.

6. Within a couple weeks of this meeting on April 15th, Mr. Collins spoke to Mr. Root who advised him that the plant was not going to be called East Huron Poultry and at that point Mr. Collins let the matter drop.

7. On or about June 2nd, 1987 members of management had meetings with the 10 Cuddy Boulevard plant employees advising them that there was going to be a strike at the Trafalgar Road plant. They further advised the employees at 10 Cuddy Boulevard that they were non-union and were not part of the strike in any way and further gave them general advice about what to do in the event picket lines were set up around the 10 Cuddy Boulevard plant. Specifically they were told to contact management who would arrange for a bus to bring the employees into work if there were picket lines. Management made it extremely clear at this meeting that the 10 Cuddy Boulevard plant was non-unionized and was not to participate or assist in any way in the strike at the other plant.

8. From June 4th to June 22nd the employees at the Trafalgar Road plant were on strike while the employees at the 10 Cuddy Boulevard plant continued to work. They did not participate in the strike nor did they participate in any ratification vote. They were not even consulted in any way or contacted by UFCW concerning any issue as to union representation or the strike.

9. The employee witnesses will testify that UFCW did not contact them at all until the meeting which eventually took place on August 9th.

10. During the month of July, the witnesses employed at 10 Cuddy Boulevard continued to attend at work and again their terms and conditions of employment remained inferior in all respects to those at the Trafalgar Road plant. Those employees will also indicate that they had no contact from UFCW or management concerning the collective agreement which was allegedly signed on July 30th.

11. In late July, Tom Collins had another phone conversation with Mr. Root concerning whether or not there was a collective agreement at the 10 Cuddy Boulevard plant. It should be noted that employees at 10 Cuddy Boulevard continued throughout this period to contact Retail, Wholesale requesting that they form a union in that plant as they thought it was a non-union plant. In any event, in late July Mr. Collins asked Mr. Root directly if there was a collective agreement for the 10 Cuddy Boulevard plant. Mr. Root advised that there was not a collective agreement in existence at that time but that they were planning to sign a collective agreement in the near future. At this point it was common knowledge that the collective agreement had been concluded and ratified for the Trafalgar Road plant on or about June 19th. It was not until this conversation with Mr. Root that RWDSU had any direct knowledge whether or not the Cuddy Boulevard plant employees were covered by any agreement applicable to the Trafalgar Road plant(s).

12. On or about August 3rd or 4th notices were posted in the 10 Cuddy Boulevard plant and meetings held with groups of employees in various sections of the plant by management to advise the employees that a membership meeting was going to be held with UFCW on August 9th. The employees were advised that they were free to attend or not but were strongly urged to attend. They were also advised by their supervisors that the union had a contract but that they could go to the meeting and listen and if they did not like the contract or the union it was their right to refuse to have a vote. In addition they were advised that it was also their right to vote for UFCW or another trade union or no union at all if they wanted. The employees felt that they could either accept or reject the union or accept or reject the contract which had been negotiated for them and that the meeting was just to determine if they wanted to become members.

13. The contacts and notices for the meeting were posted and/or delivered by management and at no prior time did UFCW contact the employees directly.

14. On or about August 9th, the UFCW representatives were asked why the employees were not allowed to vote with the other plant employees on the previous contract (the memo of June 19). The answer they received from Mr. Damien and Mr. Hurley was that they did not have a right to vote on that contract as they were a separate plant.

15. They were also asked why there were separate agreements between the two and again the same answer was received, i.e. the plants were separate and distinct and they had separate collective agreements because of that.

16. Employees also raised questions as follows:

- do we have to accept the UFCW? - the answer given was yes;
- do we have a choice whether or not to join - the answer given was you have no choice in the matter;
- can we decertify UFCW - the answer given was no, not at this time.

Mr. Damien was asked to confirm these answers in writing but he refused.

17. In general at this meeting, there was a lot of unhappiness expressed when the terms of the collective agreement were disclosed, and the questions and answers noted above were given.

18. During the course of the meeting some employees raised the fact that they were going to go to the Canadian Union of Auto Workers.

19. All employees will also confirm that they had not had any union dues deducted until the second week of October, 1987.

20. Tom Collins will also testify that the triggering events which caused him to file the application for certification were the events at the meeting of August 9th and in particular the fact that employees were looking at the Canadian Auto Workers Union to represent them in their relationship with Cuddy Food Products Limited. Based on all these facts Mr. Collins concluded that UFCW only held voluntary recognition rights and likely had very little if any support from the employees.

21. The employees will also give evidence that their job functions are the same as those employees employed in the Trafalgar Road plant. The only different job functions which would not fall within existing job classifications in the Trafalgar agreement consist of approximately 20 positions involved with the "kill" aspect of the Cuddy Street operation exclusively.

The other participants could not agree that all of the allegations set out in this statement were true. Before hearing the applicant's evidence in support of these allegations, we invited submissions on whether section 60 of the Act would be applicable even if all these allegations were true and (despite its application under section 62) Local 175 was considered "a trade union that had not been certified as the bargaining agent" for employees in the bargaining unit covered by the Cuddy Boulevard agreement.

II

22. As we have already noted, the position of both Cuddy and the interveners was that Local 175's bargaining rights under the 1985 collective agreement covered all of the City of London, not just the facilities at Trafalgar Road; accordingly, the Cuddy Boulevard agreement covered employees for whom Local 175 already had bargaining rights and was not, therefore, a *first* collective agreement within the meaning of subsection 60(1) which provides:

60.-(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one

year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

Implicit in that position was the proposition that the trade union party to the Cuddy Boulevard agreement, Local 175, was the trade union party to the 1985 agreement.

23. The trade union party to the 1985 agreement was described in it as “United Food & Commercial Workers International Union, AFL-CIO, CLC on behalf of Local 175 United Food & Commercial Workers International Union, Region 18, AFL-CIO, CLC.” Some “parent” unions create “locals” for administrative purposes but retain in their own name the legal bargaining rights and corresponding legal representation obligations with respect to the bargaining units from which the local’s membership is drawn. In other union organizations, locals (which under the Act are ordinarily treated as trade unions distinct from their “parent”) hold the bargaining rights but receive various forms of assistance from their parent union, including assistance in collective bargaining. Because of this variety of practices, a description in a collective agreement of the trade union party as “[parent] on behalf of [local]” can be ambiguous as to whether it is the parent or the local which holds bargaining rights for the employees covered by the agreement. Having regard to the evidence before us, we were satisfied that Local 175 was the trade union with bargaining rights under the 1985 agreement, and so indicated in our oral ruling of November 27, 1987.

24. The applicant argued that

a) the words “of its plant” in Article 2 of the 1985 agreement limited that agreement’s scope to the Trafalgar Road facilities;

and,

b) even if Local 175’s bargaining rights under the 1985 agreement did extend to all of the City of London, Local 175 lost those rights with respect to 10 Cuddy Boulevard when, in bargaining for the renewal of the 1985 agreement, it ratified the June 19th settlement which was understood not to cover 10 Cuddy Boulevard

so that in either case the Cuddy Boulevard agreement constituted a voluntary recognition and first collective agreement with respect to employees at 10 Cuddy Boulevard.

25. In many cases, the scope of bargaining rights for employees of an employer are first defined by this Board in a certification application. The Board’s approach to the matter of geographic scope of bargaining rights was described in *T.R.S. Food Services Limited*, [1980] OLRB Rep. Apr. 542, at paragraphs 4 and 5:

4. Where an employer has only one location within a municipality, the Board’s consistent practice, apart from the construction industry, has been to describe the geographic scope of the bargaining unit by reference to the municipality rather than the respondent’s particular location. This practice results from a balancing of two competing interests: the individual’s interest preserved by section 3 of the Act to be free to join a trade union of his own choice, on the one hand, and, on the other, the concern of the Board as well as the union and employees involved in any particular case that sufficient stability adhere to the bargaining rights conferred. (See generally the Board’s decisions in the *Great Atlantic & Pacific Tea Company Limited*, [1969] OLRB Rep. Jan. 1017; *Perimeter Industries Limited*, [1973] OLRB Rep. Mar. 174; *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637; *Inglis Limited*, [1977] OLRB Rep. Mar. 128; and *York Steel Construction Limited*, decision dated February 25, 1980, File No. 1501-79-R, as yet unreported).

5. While limiting a bargaining unit to the respondent’s particular location would give consider-

able latitude to an individual's freedom to join a trade union of his own choice, it could, at the same, jeopardize the stability of the bargaining rights conferred upon the union. If an employer moves the location of its operation in a situation where the bargaining unit has been defined by reference to the employer's street address, the union's bargaining rights may be extinguished by the move. The Board's general policy of describing the geographic scope of a bargaining unit by reference to the municipality in which the employer's operation is situated instead of the particular location inhibits bargaining rights from being disturbed in this manner.

26. Subject to sections 15 and 68 of the Act (and, where bargaining rights are extended, subject also to section 60), the employer and trade union parties to a collective bargaining relationship are free to amend, extend or abridge the bargaining rights established at the time of certification or in a prior agreement. In *Gilbarco Canada Ltd.*, [1971] OLRB Rep. Mar. 155, the Board observed that:

... Where bargaining rights in a collective agreement are not as extensive as those contained in a certificate, then that is *prima facie* evidence of an abandonment of that portion of the bargaining rights contained in the certificate, but not contained in the collective agreement. In effect the collective agreement supplants the rights given by the Board's certificate and the Board's certificate is spent once the collective agreement is signed. Or to put it another way the best evidence of the bargaining rights extant are those that are contained in the collective agreement. In the same way as bargaining rights in a collective agreement supplant bargaining rights contained in a certificate so too bargaining rights in subsequent collective agreements may supplant bargaining rights contained in prior collective agreements.

27. The Board's practice in certification applications is a relevant consideration in interpreting collective agreement recognition language, as arbitrator O. B. Shime observed in *Re Canadian Appliance Manufacturing Company Ltd.* (1978), 20 L.A.C. (2d) 59, at pages 63 and 64:

It is not unusual to find a union described as the sole bargaining agent for a group of employees in a specific municipal area. Certificates granted by the Ontario Labour Relations Board generally define a bargaining unit as being within a municipal area: see, e.g., *Canadian Telephone Employees' Assoc. v. Tele-Direct Ltd.*, [1971] O.L.R.B. Rep. 490 (Boscar) at p. 491. Specific locations or street addresses are rarely, if ever, used to define the union's jurisdiction: see, e.g., *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Canadian Chromolax Co.*, [1968] O.L.R.B. Rep. 980 (Egan); *Bakery & Confectionery Workers' Int'l Union of America, Local 264 v. Great Atlantic & Pacific Tea Co. Ltd.*, [1969] O.L.R.B. Rep. 1017 (O'Shea). To do so would eliminate bargaining rights by the mere change of address or location. The general practice has therefore been to describe bargaining units in terms of a municipal area in order to avoid the problems or industrial unrest that might occur should the company change its location.

Of course the limitation of bargaining rights to a municipal area does not completely protect bargaining rights because a company may move its operations to another municipality and, in that case, the union will lose such rights: see, e.g., *United Steelworkers of America, Local 4487 v. Inglis Ltd.*, [1977] O.L.R.B. Rep. 128 (Burkett) at p. 137. This potential loss is particularly offset by permitting the union to have bargaining rights in the event that new operations are commenced by the company within the municipality: see, e.g., *Amalgamated Meat Cutters & Butcher Workmen of North America, AFL CIO, Local Union 633 v. Homedale IGA Foodliner (St. Thomas)*, [1964] O.L.R.B. Rep. 652; *United Rubber, Cork, Linoleum & Plastic Workers of America v. Goodyear Service Stores* (1965), C.L.L.C., para. 16,027, p. 711.

• • •

This general practice has, for the most part, been adopted and understood by employers and unions when drafting collective agreements. No doubt unions have from time to time during bargaining sought to expand the recognition clause of their agreements to protect against possible changes in location by employers, while employers have sought to contract the recognition clauses to limit the employees who are represented by the union. However, bargaining rights are generally considered to be coterminous with the descriptions contained in a collective agree-

ment: *Goodyear Service Stores*, *supra* [65 CLLC ¶16,027]. In short, the practice of describing the bargaining unit in a collective agreement and the general intent of the parties has generally been considered to be consistent with the practices and understandings of the Ontario Labour Relations Board, with the parties having full freedom to modify such recognition clauses through collective bargaining. The onus is therefore on the party which seeks to depart from the generally understood practice to demonstrate that the collective agreement warrants such an interpretation.

28. Article 3 of the 1985 agreement, and particularly its “all employees ... in the City of London” starting point, clearly had its linguistic origins in the certificate issued to the Amalgamated Meatcutters in 1978. If the words “of its plant” did not appear in Article 2 then, in view of the principles reviewed in *Re Canadian Appliance Manufacturing Company Ltd.*, *supra*, there would be no doubt that employees at 10 Cuddy Boulevard fell within the scope of the bargaining rights recognized in that agreement. What, then, is the meaning and effect of the words “of its plant”?

29. The word “plant” can be used to collectively denote the fixtures, machinery and other property used in an industrial process, and in that sense may be used synonymously with the word “factory.” The difficulty which arises if it is thought to be used in that sense in Article 2 can be illustrated by asking when the sum total of the fixtures, machinery and other property used by an employer in its business will collectively constitute more than one “plant.” In colloquial usage, two groupings of assets which are each self-contained functionally and are physically separate each from the other would each generally be described as a “plant.” The degree of physical separation required for this result is not a question which can be determined by reference to a dictionary, but in this case we know that the parties to this agreement thought and spoke of the Trafalgar Road facilities as consisting of two “plants”, “Plant A” and “Plant B”, even though the two facilities were separated only by a laneway. Counsel for the applicant would have us conclude that the singular word “plant” in Article 2 was intended by the parties to describe collectively two physically separate buildings housing functionally separate processes which the parties in other contexts thought and spoke of as constituting two “plants”. If the word “plant” as used in Article 2 could comfortably embrace two plants, though, there is no reason why it could not embrace a third. What counsel was really asking, therefore, is that we add the word “existing” to the word “plant” in Article 2. The parties could have done that themselves, but did not.

30. One must, of course, consider the word “plant” in the context in which it appears. Article 2 says:

The Company recognizes the Union as the exclusive bargaining agent for all employees of its plant as defined in Article 3.

As Article 3 clearly does not itself define a plant in the sense counsel for the applicant sought to have us interpret that term, the phrases “as defined in Article 3” and “of its plant” in Article 2 must both be referring to “employees.”

31. In a labour relations context, the word “plant” is often used adjectivally with the word “employees” to distinguish those involved in production functions from those involved in office, clerical, technical, sales and other functions. In that sense, a unit of the sort defined in the certificate granted in 1978 to the Amalgamated Meat Cutters can be and often is referred to as a “plant unit” or, more accurately, a “full-time plant unit.” It could comfortably be described as a “plant unit” even if it embraced the “plant employees” at more than one “plant.” If “employees of its plant” in Article 2 is taken as meaning “its plant employees”, the difficulty of understanding how the parties could have understood the phrase to apply to employees in two plants is overcome. Understood in that way, the word “plant” imposes a functional limitation rather than a geographic

one, and the entire phrase “employees of its plant as defined in Article 3” quite literally means that the “employees of its plant” for whom Cuddy recognizes the union as exclusive bargaining agent are “as defined in Article 3.”

32. Counsel for the applicant argued that Local 175’s behaviour in negotiating a separate agreement with respect to Cuddy Boulevard employees and in failing to pursue the claims asserted in its March letter and April grievance show that it thought its bargaining rights under the 1985 agreement did not extend beyond the Trafalgar Road facilities. These facts do not point unerringly to Local 175’s having had such a belief. We have no difficulty believing Mr. Dayman when he says Local 175 thought it did have rights for all of London, but preferred negotiation to litigation. In any event, whether one accepts Mr. Dayman’s statement in this regard or draws the inference invited by counsel for the applicant, a party’s secret belief or private doubt, as distinct from the objective facts by which the belief or doubt might be supported, is not a particularly helpful guide to the meaning of a collective agreement. Of course, this applies equally to the evidence relied on by the applicant and to Mr. Root’s evidence that Cuddy secretly believed that Local 175 did have London-wide bargaining rights.

33. We concluded that the phrase “employees of its plant as defined in Article 3” in the 1985 agreement meant that the “employees of its plant” for whom Cuddy recognized the union as exclusive bargaining agent were “as defined in Article 3.” That interpretation seemed to us less strained than one which required us to read “plant” as “existing plant(s)” and for that reason was the interpretation we preferred. That interpretation was reinforced by Mr. Dayman’s evidence that a narrowing of the geographic scope of the bargaining unit was not a topic Cuddy had ever raised or discussed with him at the bargaining table in the 1978-79 negotiations or any other negotiations before 1987. While the absence of any such discussion would not render ineffective language which otherwise clearly had that effect, the principles to which we have earlier referred, and particularly the concern for stability of bargaining rights, suggest that language which does not clearly alter the scope of bargaining rights should not readily be supposed to do so, especially if the language at issue was never discussed by the parties in those terms.

34. In support of its alternate argument that Local 175 lost any rights it had with respect to employees at 10 Cuddy Boulevard when it ratified the June 19th settlement which Local 175 and Cuddy understood would not cover employees at 10 Cuddy Boulevard, counsel cited the following statements of the Board in *Frito-Lay Canada Limited*, [1978] OLRB Rep. Sept. 831 at paragraph 6:

6. The Board has expressly recognized that, once a collective agreement is made, the source of bargaining rights shift from the certificate to the agreement itself. As the Board stated in *Gilbarco Canada Ltd.*, [1971] OLRB Rep. Mar. 155, “in effect the collective agreement supplants the rights contained in the certificate and the Board’s certificate is spent once the collective agreement is signed”. This means that where employees, originally included in the Board’s certificate, are subsequently excluded from the scope of the collective agreement, the bargaining agent cannot be said to have retained any bargaining rights in respect of these employees. See *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. Jan. 379.

35. The issue in *Frito-Lay* was whether laboratory technicians and a quality control supervisor should be included in a unit of office staff for which the Retail Clerks Union, Local 206, was seeking certification. That question turned largely on whether that union’s then existing bargaining rights extended to employees in those classifications, as the union claimed. The union had been certified 10 years earlier for an “all employee” unit of employees of a predecessor employer. Although laboratory and quality control technicians were not expressly excluded from the unit by the Board’s certificate, they had been expressly excluded from the unit described in the recognition clause of the first and every subsequent collective agreement thereafter. That was the context in

which the Board made the quoted observations and concluded that the union did not then have bargaining rights for employees in question.

36. Once acquired, bargaining rights for employees under the *Labour Relations Act* cannot be lost by a trade union (so long as it continues to exist) unless it abandons those rights or they are terminated by the Board under one of the sections of the Act. The Board did not purport to invent a non-statutory basis for termination of bargaining rights in *Frito-Lay Canada Limited*, *supra*. As appears from its reference to the decision in *Gilbarco Canada Ltd.*, *supra*, and from the passage we quoted from that decision in paragraph 26 above, the basis of the Board's decision in *Frito-Lay* was that the union there had earlier abandoned bargaining rights with respect to the employees in question there. Any question whether abandonment has occurred is a question of fact. In the *Frito-Lay* case, the express exclusion of the subject employees from the recognition clauses in successive collective agreements over a period of ten years strongly supported an inference of abandonment which the union had not rebutted. The factual circumstances here are quite different from those in *Frito-Lay*.

37. If the steps Cuddy and Local 175 took in June 1987 were sufficient to then create a collective agreement covering all full-time plant employees in London except those at 10 Cuddy Boulevard, that neither effected nor reflected an abandonment by Local 175 of its bargaining rights with respect to Cuddy Boulevard employees. Neither Local 175 nor Cuddy intended that course of action to effect an abridgement of Local 175's total bargaining rights; rather, the settlement was intended to cover just one of the two bargaining units into which the single bargaining unit defined in the 1985 agreement had been or was to be reorganized in accordance with the parties' intentions in that regard. Counsel for the applicant said that could not be done, however, citing sections 41, 49, 50, 52 and 72(5) of the Act in support of the proposition that a bargaining unit is legally indivisible.

38. The freedom of parties to a collective bargaining relationship to redefine bargaining rights, to which we made reference in paragraph 26, has been understood to include the freedom to consolidate two or more existing bargaining units into one bargaining unit: *Bestview Holdings Ltd.*, [1983] OLRB Rep. Feb. 185. For the same labour relations reasons which support that view, the parties to a collective bargaining relationship must also be free to divide a bargaining unit into two or more units. This is not inconsistent with exclusive recognition (section 41), nor with the requirement that there be no more than one collective agreement at a time with respect to employees in a single bargaining unit (section 49).

39. A single collective agreement document may address more than one bargaining unit (*Ontario Hydro*, [1978] OLRB Rep. Aug. 754; *Milltronics Ltd.*, [1980] OLRB Rep. Jan. 56; *K-Mart Canada Ltd.*, [1982] OLRB Rep. Nov. 1660; *Bestview Holdings Ltd.*, *supra*) and a collective agreement covering one unit may consist of more than one document (see *Graphic Centre (Ontario) Inc.*, [1976] OLRB Rep. May 221 at paragraph 12). It follows that a collective agreement can be amended during its term to divide the bargaining unit described in it into two (or more) units and, further, that the terms referable to each unit can be put into separate collective agreement documents, provided that subsection 52(3) is complied with by ensuring that (unless and until the consent of the Board is obtained to a shorter duration in either unit) the term of operation prescribed in each such document remains the same as that of the pre-amendment collective agreement. Accordingly, division of the unit described in the 1985 agreement into two units was possible even if, as counsel for the applicant suggested at one point, the parties' June 1987 settlement brought into effect at that time a collective agreement with a recognition clause unchanged in scope from that of the 1985 agreement. Even in that event, the July 30th Cuddy Boulevard agreement could have effect as an omnibus amendment to that initial collective agreement, albeit one

about which it could be said (although perhaps not by the immediate parties to it) that its provisions as to term of operation are ineffective to the extent they are inconsistent with the corresponding provisions of the June 1987 settlement.

40. Counsel for the applicant argued that effect should not be given to the creation of a separate bargaining unit and making of a separate collective agreement with respect to Cuddy Boulevard employees because this would create undesirable uncertainty about the timing of the “open period” during which employees are supposed to have the opportunity to terminate bargaining rights if they wish.

41. When sections 5, 57 and 61 of the Act are read together, it is apparent that some opportunities to terminate or displace bargaining rights are intended to be available to employees whatever might be done by their employer and the union currently representing them, while the timing, duration and even occurrence of other such opportunities is contingent on matters over which the employer and union do have control. Only the two month open periods referred to in subsection 57(2) fall into the “guaranteed” category. Only they are certain and predictable in timing, duration and occurrence, from an employee’s point of view (although even they are perhaps not entirely inviolate - see *Collingwood Fabrics Inc.*, [1985] OLRB Rep. Feb. 228). Neither recognition of a freedom to divide a bargaining unit nor the possibility of its exercise creates any general uncertainty or unpredictability about the occurrence or timing of any of the “guaranteed” two month periods, bearing in mind the protection afforded by subsection 52(3) of the Act. There is no uncertainty about the guaranteed two month period here: that period occurred during the last two months of operation of the 1985 collective agreement, which ended February 8, 1987. The uncertainty here, even in retrospect, was about how long the opportunity to displace or terminate bargaining rights remained open in the period *after* the “guaranteed” two month period was over, having regard to subsequent events and the proper legal characterization of them. That kind of uncertainty about the extended open period which may follow a “guaranteed” one is not uncommon; the potential for it exists whether or not one acknowledges a freedom to divide bargaining units.

42. The way the parties went about exercising their freedom to divide the bargaining unit described in the 1985 agreement and the absence of a body of jurisprudence dealing in any detail with the legal mechanics of exercising that freedom together created some uncertainty about when the division became legally effective. That question was not fully explored in argument at this first stage of the proceedings. It was not one which it was necessary for us to then answer, because no possible answer could affect the applicability of section 60 to the Cuddy Boulevard agreement.

43. When a bargaining unit has been or is to be divided into two (or more) units, there is no reason why the first collective agreements with respect to each of the resultant units should have to be made simultaneously in order to avoid a loss of bargaining rights. While the freedom to divide or consolidate bargaining units is limited by sections 15 and 68 of the Act, it is not limited by section 60 because simple division or consolidation does not involve extension of bargaining rights to previously unrepresented categories of workers.

44. Whatever word Mr. Root may have used in conversations with Mr. Collins prior to July 30, 1987 to describe the agreement he was negotiating or had negotiated with respect to 10 Cuddy Boulevard, we were satisfied that that agreement was not a “recognition” agreement. Employees at 10 Cuddy Boulevard fell within the scope of Local 175’s bargaining rights under the 1985 agreement, which had been in effect for considerably longer than the one year period specified in section 60. Local 175 had not abandoned its rights with respect to those employees before entering into the Cuddy Boulevard agreement.

45. Subject to the outcome of the complainants' claim that it should be set aside by way of remedy for the alleged breach of section 68, the Cuddy Boulevard agreement therefore constituted a bar to any certification application with respect to the employees covered by the agreement and we so ruled on November 27, 1987.

III

46. At the conclusion of our oral ruling on November 27, 1987, we advised the parties we had some doubt about whether the allegations of the complainants, if true, established a *prima facie* case for the granting of any remedy which involved setting aside the Cuddy Boulevard agreement. We noted that if the complaint would not in any event lead to a remedy which affected the Cuddy Boulevard agreement, the certification application could be finally disposed of and the employer's direct interest in the remaining issues brought to an end without hearing further evidence. We directed that the parties provide us with their arguments on that issue on the next scheduled hearing days in January 1988.

47. Thereafter, by letters dated November 27 and December 23, 1987, counsel for the complainants sought leave to amend their complaint to

(a) add three employees as complainants,

(b) add Cuddy as a party respondent "to the extent that relief is necessary against" it, Cuddy having been originally named in the complaint as a party affected by the complaint,

(c) add the allegation that the complainants had also been dealt with contrary to subsection 72(5), and

(d) make additional assertions of fact and claims for relief in respect of alleged violations of sections 68 and 72(5).

The respondent unions and Cuddy consented to these amendments when our hearings resumed January 6, 1988. Counsel for the complainants then entered into his argument on the issue scheduled for hearing that day. During that argument, the Board noted that there had been no allegation that any of the alleged acts or omissions of Cuddy constituted a violation of the *Labour Relations Act*, and asked why, even if it had the jurisdiction to do so in those circumstances, the Board would set aside a collective agreement as against a party who had not breached the Act. Counsel responded to that question by requesting leave to amend the complaint to allege that Cuddy *had* breached some provisions of the *Labour Relations Act* by reason of the acts and omissions of members of its management to which reference had already been made in their particulars and in proceedings to date. He also asked for an adjournment so that he could put into writing particulars of the sections breached and of how the acts and omissions amounted to breaches of those sections. When pressed, counsel said those sections would be 57, 61(2), 64, 66(c) and 72(5). Both the amendments and the adjournment were opposed by the respondents.

48. The factual basis of the proposed new claim against Cuddy was known when it was pleaded in support of the complaint that the intervener trade unions had violated section 68 of the Act. Our hearing of evidence which could later be applied to the complaint had proceeded on the basis that no breach of the Act by Cuddy was being alleged. That circumstance might well have affected the way Cuddy and the respondent unions had responded to and presented evidence in the hearings up to that point. Retrospective application of evidence heard and admissions made in those hearings to this new claim could therefore have prejudiced those respondents. It would have

been difficult to assess what that prejudice actually was and determine how it could be cured, if at all. That assessment would have delayed these proceedings. A cure for prejudice might also have caused delay. It might have been necessary, for example, to permit the recall of one or both of the witnesses. Apart altogether from the delaying effect of an adjournment at the request of the complainants, the requested amendment would have substantially altered the nature of the issue which the parties had come that day prepared to argue, and that consideration might well have necessitated an adjournment at the respondents' request.

49. We considered the prospect that the complainants might file a separate complaint in the same terms as their proposed amendments to this one (a prospect with which the respondents said they were prepared to live) and took into account the desirability of hearing related matters together in a single proceeding. We had also to consider that these proceedings have a certification application at their heart. While expedition is important in all labour relations matters, it is especially important in certification matters. As the Board observed in *Fleck Manufacturing Limited*, 62 CLLC ¶16,236:

It is incumbent on all parties to proceedings before the Board to investigate matters relevant to their cases as early as possible and if they intend to make allegations of improper or irregular conduct against another party to do so promptly. The object of this requirement, which finds expression in section 48 [now 72] of the rules, is obviously to expedite and facilitate the hearing and processing of applications under the Act and to avoid prejudice, delay or embarrassment to the parties involved. Delayed and last-minute allegations, which lead to adjournments or cause prejudice, embarrassment or unnecessary expense to the other parties, and which with reasonable diligence could have been made at a more timely stage of the proceedings will not be entertained except for good and sufficient cause.

The obligation to give timely notice of allegations of misconduct on which they propose to rely applies as much to those who support an application for certification as to those who oppose it: *Gignac, Sutts, Nosanchuk*, [1973] OLRB Rep. Aug. 438. Even though they had particularized at the outset the behaviour which they now wished to characterize as contrary to the Act, the complainants' failure to so characterize it at the earliest opportunity was a breach of subsection 72(1) of the Board's Rules of Procedure, which requires not only that each party file a timely statement of allegations of improper or irregular conduct on which he relies, but also that

where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

Counsel for the complainants offered no explanation for the delay in asserting that Cuddy's conduct constituted a violation of the Act. We saw no good or sufficient reason why we should begin entertaining that allegation in these proceedings, having regard to the stage the proceedings had reached and the fact that they involved a claim for certification, and ruled that we would not do so.

50. After that ruling, argument continued on the issue whether the allegations of the complainants, if true, established a *prima facie* case for the granting of a remedy involving setting aside the Cuddy Boulevard agreement. There were two main aspects to the question: whether the Board has jurisdiction to grant such a remedy as against a party to the collective agreement who neither consented nor could be found to have violated the Act and, if the Board did have such jurisdiction, whether the facts pleaded would, if true, warrant granting such a remedy. After hearing the arguments of each counsel and before hearing reply argument on behalf of the complainants, we came to two conclusions. The first was that we might not be able to complete the formulation of a considered answer to the jurisdictional aspect of the question before the previously scheduled hearing dates in February. The second was that with respect to the other aspect of the question - whether such a jurisdiction might be exercised - we could not then confidently say that there was no out-

come of a hearing into the complainants' allegations, and particularly the allegations of misrepresentation by Cuddy management, in which we would choose to exercise a jurisdiction to set aside the collective agreement. Having regard to the need for expedition, we thought it better in those circumstances to proceed to hear the evidence with respect to the complaint on those February hearing dates and apply the parties' arguments to our findings on that evidence, rather than ponder the issue on the basis of assumed facts and risk delaying a hearing in which the complainants and the trade union respondents to their complaint would have to participate in any event. Having adopted that course, it was unnecessary to hear the complainants' reply argument at that time. We advised the parties of these conclusions, and adjourned to February 9, 1988 to hear the parties' additional evidence with respect to the complaint.

51. In retrospect, we should note that neither the question we had posed nor the argument counsel offered in response focused on the question whether, even if it were proper to grant a remedy under section 89 setting aside a collective agreement, such a remedy should be granted with effect as of a date prior to the decision granting it and prior even to the date of filing of the complaint in which the remedy is sought. Nothing about the course these proceedings have taken should be taken as reflecting any considered view on that question.

52. On January 21, 1988, counsel for the complainants filed a complaint (Board File No. 2911-87-U) against Cuddy, repeating the allegations in the complaint before us and asserting that Cuddy's behaviour constituted a breach or breaches of the Act. In his covering letter of January 15, 1988 to the Registrar, counsel noted our ruling and asked that the matter be scheduled before a different panel.

53. In the meantime, in early January 1988 Cuddy had transferred its turkey deboning line and the workers on that line from the Trafalgar Road turkey processing plant to the Cuddy Boulevard plant. On February 8, 1988, counsel for more than 100 of those employees ("the transferees") wrote to the Board and to counsel for the parties to these proceedings, giving notice of their desire to intervene in these proceedings and of a complaint which they proposed to file and wished to have consolidated with this one. That complaint alleged that Local 175 (and UFCW) knew or ought to have known of the proposed transfer of the turkey deboning line before concluding either of the 1987 collective agreements, that at the June ratification meeting Don Dayman had led Trafalgar Road employees to believe that the terms of the agreement on which they were voting would govern their employment at Cuddy Boulevard when they were transferred and that it had been improper in the circumstances for Local 175 to conclude the Cuddy Boulevard agreement without consulting them. The main relief sought was the application to transferees at Cuddy Boulevard of the collective agreement provisions for which they had gone on strike in June 1987 - that is, the agreement which, according to Cuddy and Local 175, applied to them only while they remained at Trafalgar Road. Furthermore, the transferred employees opposed both the RWDSU certification application and any attempt to "force an 'open period'" at the Cuddy Boulevard plant.

54. At the opening of our hearing on February 9, 1988, counsel for the complainant transferees requested that their complaint be consolidated and heard together with these proceedings or, in the alternative, that they be given standing as interveners in these proceedings. He indicated they would be content that evidence adduced in hearings to date would apply to their complaint if their request was granted. Counsel for the present complainants supported consolidation of the transferees' complaint and added a request that their new complaint in Board File No. 2911-87-U also be heard together with the matters then before us. Cuddy and Local 175 had had little advance notice of the transferees' complaint and consolidation request and no notice of the consolidation request made by counsel for the present complainants. Their counsel opposed both requests.

55. For our purposes, the issue was not whether the other complaints would be heard at all but, rather, whether this panel would begin hearing them together with the proceedings then before us, in respect of which the hearing of relevant evidence had already begun. We again weighed the desirability of hearing all related matters together against the adverse impact consolidation would have on the expeditious disposition of the proceedings already before us. Having regard to the fact that these proceedings involved a certification application, to the short notice which the respondents to them had of the consolidation applications and of the transferees' complaint itself and to the problems (to which we have earlier referred) inherent in retrospectively applying to these new complaints the evidence we had already heard, we ruled that we would not grant either of the consolidation requests.

56. We did grant the transferees' request for standing as interveners in these proceedings. Insofar as that gave them standing with respect to a section 89 complaint in which their trade union bargaining agent was respondent, we did so in the exercise of our discretion without making any finding that they were entitled to such standing as a matter of right. After the day on which the transferees were granted standing as interveners, their counsel advised counsel for one of the other parties that they would not take any further active part in these proceedings. No one attended our hearings on their behalf thereafter, nor did anyone ask that the transferee interveners be relieved of the standing they had been granted.

IV

57. The allegations referred to in paragraph 20 and assumed true for the purposes of our decision of November 27, 1987 were not all proved true in the second phase of our hearings. Tom Collins did not testify, for example, so the only evidence we have about the conversations referred to in paragraphs 1, 4, 5 and 6 of RWDSU's statement of evidence is the evidence Mr. Root gave during the first phase of our hearings. While he then acknowledged having had some conversations with Mr. Collins in the time frame in question, Mr. Root denied telling Mr. Collins that Cuddy was negotiating a "recognition agreement" for the Cuddy Boulevard plant, and his version of those conversations differed in several other respects from what RWDSU alleged. While employee witnesses called during the second phase said they believed other employees had approached or looked into certain unions after the Cuddy Boulevard plant opened and before they learned of the collective agreement with Local 175, none of the witnesses had been directly involved; there was, therefore, no direct evidence that RWDSU or any other union was approached by any Cuddy employee in that time frame.

58. Evidence in the second phase did very clearly establish that, from the time of their pre-hiring interviews until they learned of the Cuddy Boulevard agreement, employees at the Cuddy Boulevard plant were told by members of management that that plant was not unionized and that employees there could choose whether to bring in a union, form their own union or continue without a union.

59. Ken Dodge was interviewed for his job by Mark Bossy, the Personnel Manager at the Cuddy Boulevard plant. Mr. Bossy told him that the plant was not a unionized plant but down the road it might be. David Findlay was interviewed by Mr. Root, who told him that the plant was non-union. Mr. Root acknowledged during his testimony in the first phase that employees hired for the Cuddy Boulevard plant may have been told that it was a non-union plant, and that there had been no directive or advice from management to disabuse them of that belief.

60. A few days before the Trafalgar Road employees went on strike, the general manager at the Cuddy Boulevard plant, Larry Moss, called a meeting or meetings of employees to discuss the possibility that the plant might be picketed in connection with that strike. He told employees

that their plant was non-union, that they were not part of the Trafalgar Road plant and that they would not be involved in the strike. Some employees asked if they could get a union. Mr. Moss said they could get a union or have no union, it was up to them. The complainants and RWDSU allege that this meeting took place on June 2, 1987, *after* Cuddy and Local 175 say they orally agreed on all the terms of a collective agreement covering the Cuddy Boulevard plant. Taken together, evidence of the employee witnesses about the timing of the meeting was sufficiently inexact that this meeting may have taken place either shortly before or shortly after that agreement was reached. In any event, employee discussion about the possibility of a union continued after this meeting. In conversations about that possibility later in June, well after the oral agreement, supervisors John Lapin and Jack West were still telling Ken Dodge that the plant was non-union.

61. In early August 1987, there was a notice by the time clock at the Cuddy Boulevard plant of a union meeting on Sunday August 9th at a local restaurant. Before that day, Larry Moss called another meeting or meetings of Cuddy Boulevard employees to urge them to attend the union meeting. He told employees they would be able to vote on whether or not they wanted a contract which had been worked out with the union. A number of Cuddy Boulevard employees went to the union meeting. Mr. Dayman presided. He told them that the meeting was to discuss the contract which would cover them at Cuddy Boulevard, not to vote on whether or not they wanted the contract or the union. The employees were not pleased with a clause in the agreement which allowed employees transferred from Trafalgar Road to bring their seniority with them to Cuddy Boulevard. They got (probably from Mr. Dayman's briefcase) a draft of the agreement which had been made to cover the Trafalgar Road plants. They were not happy that the wage rates and other provisions of the agreement for Cuddy Boulevard were less favourable than those the union had negotiated for Trafalgar Road. They were not pleased that they had no choice about either the contract, which Mr. Dayman told them had already been ratified and signed, or the union, which Mr. Dayman said could not be decertified at that time. Some employees at the meeting demanded that Mr. Dayman give them written confirmation of some of the things he had said about their lack of choice. He refused. The meeting was not a happy one.

62. Mr. Dayman testified again in this second phase of our hearings. He elaborated on his earlier evidence concerning the course and results of negotiations for the Cuddy Boulevard contract. He had proposed a separate contract for that location, he says, because he understood employees there would be involved in killing birds and eviscerating the carcasses, functions which were not performed at Trafalgar Road. He seems not to have given much weight to the information he had from the outset that some Trafalgar Road operations would probably be transferred to Cuddy Boulevard at some point in the future. He says he did not consult any Cuddy Boulevard employees because before April 1987 there were none and after April 1987 he did not know any of the employees who were working there. Before he signed the Cuddy Boulevard agreement, Mr. Dayman did not ask Cuddy who those employees were, or how many of them there were or what their existing wages and other terms and conditions of employment were. He was not aware that for most workers the initial wage rates provided for in the agreement he negotiated were rates Cuddy had established for those positions before the employees in them began work in April.

63. Mr. Dayman did not consult with any Trafalgar Road employees about the Cuddy Boulevard agreement because he felt it did not concern them; this despite knowing that some of them might be transferred to Cuddy Boulevard, a matter which he addressed in bargaining by having the following article included in the agreement:

16.16 Should a bargaining unit employee be transferred from Cuddy Food Products Ltd., 1226 Trafalgar Street, London, Ontario, such employee shall retain the following for the life of this Agreement:

- 1) Seniority
- 2) Vacation Entitlement
- 3) Wages - on a Red-Circled basis.

We note that the formal collective agreement incorporating the terms of the memorandum of June 19, 1987 has attached to it a subsequent letter of understanding about transfers to the Cuddy Boulevard plant. The parties' inability to agree on the wording of this letter is said to be one of the reasons why that formal agreement was not signed until December 11, 1987.

64. Two of the transferees were called as witnesses. They testified about what Mr. Dayman had said at the strike vote and ratification vote meetings in May and June, 1987, in support of the proposition that he had at one or both of those meetings told Trafalgar Road employees that the agreement they ratified would apply to them if they were transferred to Cuddy Boulevard. Mr. Dayman testified that the issue only came up at the ratification meeting, that he had said they would take their wages (red circled), seniority and vacation entitlement with them if transferred and that he had refused otherwise to discuss Cuddy Boulevard with the Trafalgar Road employees. We received the evidence because it was arguably relevant to issues before us. The evidence we heard about what was said at the strike and ratification meetings was and is also relevant to the transferees' complaint, which is not before us. It is not necessary for us to decide whether Mr. Dayman's remarks at those meetings (whatever they were) would have led employees then employed at Trafalgar Road to believe that the agreement they were called upon to ratify would apply to them if they were transferred to 10 Cuddy Boulevard. No possible answer to that question would affect the conclusions at which we have arrived.

65. The Cuddy Boulevard and 1987 Trafalgar Road agreements differ in a number of respects. The Cuddy Boulevard agreement has a term of two years, expiring May 31, 1989. The Trafalgar Road agreement has a term of three years ending February 7, 1990. This longer term is part of the price the union paid to achieve its demand for pension plan provisions which require employer contributions in the second and third year of the agreement. The Cuddy Boulevard agreement has no pension provisions. Insofar as they are different from those of the Trafalgar Road agreement, the non-monetary provisions of the Cuddy Boulevard agreement are generally more favourable to Cuddy, although not startlingly so. Apart from the lack of pension provisions, the major different in the monetary provisions is in the wage rates.

66. There was some debate about the comparability of the job classifications at the two plants. While there is no job at Trafalgar Road comparable in function to the live receive, live hang, kill and eviscerate jobs at Cuddy Boulevard, only a relatively small portion (10 to 15 per cent) of workers at Trafalgar Road perform those functions. The workers in those jobs are paid at an hourly rate 25¢ higher than the base rate. A substantial portion of the workers at each plant are paid at the base or general rate established in the applicable agreement. At the time the agreements were made, a number of workers at Trafalgar Road were engaged in deboning turkeys and a number at Cuddy Boulevard were engaged in deboning chickens. While there are some differences in these two functions, no one seriously suggested that they were the major reason for the differences in wage rates negotiated for these workers.

67. For all but one classification (millwright), wage rates are lower under the Cuddy Boulevard agreement than for the comparable classifications at Trafalgar Road. Indeed, the rates being paid under the 1985 agreement at the time it expired in February 1987 were higher than the rates which became effective June 1, 1987 under the Cuddy Boulevard agreement. The general and base hourly rates, respectively, under the Trafalgar Road and Cuddy Boulevard agreements are as follows:

<u>Trafalgar Road</u>				
Feb. 87	Aug. 87	Feb. 88	Aug. 88	Feb. 89
\$8.90	9.10	9.30	9.55	9.75

Cuddy Boulevard

June 87	Dec. 87	June 88	Dec. 88
\$8.35	8.45	8.65	9.25

The general rate under the 1985 agreement had reached \$8.65 per hour on August 8, 1986.

68. As regards the differences between the Cuddy Boulevard agreement and the agreement ratified by Trafalgar Road workers in June 1987, Mr. Dayman observed that the Cuddy Boulevard plant was a new plant with new, relatively untrained employees. He felt he could do better for the workers after they had been trained and become established, and in that regard had sought only a two-year agreement. He was aware of the wage rates at Trafalgar Road but was aware also of the lower wages and inferior working conditions that the RWDSU had negotiated for workers at a kill plant in Dublin, Ontario owned by East Huron Poultry, a corporate relative of Cuddy. He was seeking to get rates and benefits closer to those at Trafalgar Road than those at East Huron Poultry. There was no suggestion that he had failed in that respect.

V

69. The complainants say that Local 175 breached its duty to them under section 68 of the Act by agreeing to place employees at 10 Cuddy Boulevard in a separate bargaining unit, by failing to pursue the grievance of April 22, 1987, and by entering into a collective agreement for that bargaining unit which is "inferior" to the collective agreement it negotiated to cover other employees of Cuddy in the City of London, all without consulting employees at 10 Cuddy Boulevard. The complainants also allege that Local 175 breached subsection 72(5) of the Act by failing to invite employees at 10 Cuddy Boulevard to the meetings at which strike and ratification votes were held in May and June, 1987, respectively. The complainants argue that until the division of Local 175's city-wide bargaining unit into two units was effective for the purposes of the Act, the "bargaining unit" referred to in subsection 72(5) included employees at both Trafalgar Road and Cuddy Boulevard. They argue that the division could not be effective until it was reflected in a written agreement between Local 175 and Cuddy, and no written agreement expressly reflected the division until the Cuddy Boulevard agreement was signed.

70. The primary remedy sought by the complainants is the removal of the Cuddy Boulevard agreement as an obstacle to certification of RWDSU. Several remedies with this ultimate result are proposed. The Board is asked to

- (a) set aside the collective agreement outright; or
- (b) set aside the collective agreement, subject to its being made effective again if ratified at a vote of Cuddy Boulevard employees; or
- (c) direct the conduct of a ratification vote, and set aside the collective agreement if it is not ratified; or
- (d) shorten the term of the agreement, rather than set it aside altogether, by directing both parties to apply for early termination under subsection 52(3) of the Act.

In the alternative, if the Board is not prepared to set aside the agreement, it is asked to

- (e) order a vote to determine whether employees at 10 Cuddy Boulevard wish to be represented by Local 175 or the RWDSU and, if the

RWDSU wins the vote, substitute the RWDSU for Local 175 as bargaining agent under and for the purposes of the Cuddy Boulevard agreement which, with the substitution of the trade union party, would continue in effect for the balance of its term; or

- (f) let employees at 10 Cuddy Boulevard choose whether they wish to have a bargaining unit and collective agreement separate from the ones governing Trafalgar Road employees and if the answer is that they do not so wish, require Local 175 to compensate the complainants for the difference between what they receive under the Cuddy Boulevard agreement and what they would have received under the agreement negotiated for employees at Trafalgar Road.

71. We will deal first with the claim that Local 175 has breached subsection 72(5) of the Act. That subsection provides that:

All employees in a bargaining unit, whether or not such employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

This provision does not require any trade union either to conduct a strike vote before calling or authorizing a strike or to conduct a ratification vote before ratifying a collective agreement. The subsection does not regulate the conduct of a vote which is not a strike or ratification vote, even if the trade union intends to take the results of the vote into account in making decisions about a strike or the ratification of a collective agreement: *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309. And if a trade union does choose to conduct a strike or ratification vote, subsection 72(5) does not require that the union act in accordance with the result of the vote: *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421.

72. Subsection 72(5) only defines what the minimum voting constituency must be when a trade union chooses to conduct a strike or ratification vote. It merely says that "all employees in a bargaining unit" are entitled to participate in the vote, whether or not they are members of the union. It does not even expressly limit the voting constituency to bargaining unit employees, as does subsection 149a(1) of the Act. (See also *Jack P. Fogal*, [1976] OLRB Rep. Aug. 428, a decision of which the Legislature must be taken to have been aware when in 1980 it amended what is now subsection 72(5) to give non-member employees the right to participate.)

73. Subsection 72(5) does not expressly identify the "bargaining unit" in which these eligible non-member voters are to be found. In many instances, a single trade union is the exclusive bargaining agent for more than one bargaining unit of employees of various employers; most organized bargaining units in Ontario are represented by a trade union which also represents other bargaining units of employees of other employers. The Legislature obviously did not intend subsection 72(5) to give non-member employees in every bargaining unit represented by a trade union the right to vote in any strike or representation vote that union might choose to conduct. If it were not apparent simply from reading subsection 72(5) in the context of the other provisions of the Act, consideration also of the history of the subsection as reviewed in *RCA Limited*, [1981] OLRB Rep. Aug. 1159, makes it clear that the non-member employees about whom the Legislature was concerned were those who might be directly affected by the action with which the vote is concerned. In the case of a strike vote, those would be the employees who would be expected to go out on strike if one were called - those, in other words, who would be treated as "scabs" by the union and its members if they subsequently refused to participate in the proposed strike. In the case of a rati-

fication vote, the affected employees would be the employees who would be bound by the terms of the agreement under consideration if it were entered into by the union and their employer.

74. Long before it held the strike and ratification votes in question here, Local 175 had decided to seek a division of its bargaining unit into two bargaining units, one consisting of employees at 10 Cuddy Boulevard (which will be referred to as “the Cuddy Boulevard unit”) and one consisting of all other employees in the City of London (which will be referred to somewhat inaccurately as “the Trafalgar Road unit”, since the only employees in it at any relevant time were employees at the Trafalgar Road plants). Cuddy was receptive to this idea and, for the most part, their negotiations proceeded in a manner consistent with the expectation that such a division would occur. Initially, however, the union reserved the right to insist on an undivided unit. This is clear from its letter and grievance of March 18 and April 22, 1987, respectively. There was no mutual commitment to a divided unit until at least June 1, 1987. The agreement reached on that date was an oral one; it might also be said to have been impliedly conditional on the parties’ also concluding a Trafalgar Road agreement satisfactory to Local 175. That condition was not fulfilled until the June 20th ratification vote had been conducted. The first written agreement to expressly reflect (and therefore, perhaps, effect) a division of the unit defined in the 1985 agreement was the Cuddy Boulevard collective agreement signed on August 1, 1987.

75. The agreement to split the unit defined in the 1985 agreement was one which affected all employees in that unit. Had that agreement been the subject of a ratification vote, Cuddy Boulevard employees would have been employees affected by the vote whose participation in it was clearly intended by subsection 72(5). A failure to include them would have been a clear violation of both the letter and spirit of that subsection. The fact is, however, that there was no such vote. Local 175 did not consult the views of any Cuddy employees on the matter of dividing the unit, either by way of ratification vote or by any other means.

76. The strike vote was conducted in late May. Participation in it was limited to the Trafalgar Road unit, which did not then have a separate existence on any view of the facts. The vote was about whether Trafalgar Road employees would be called out on strike. The eventual strike only began after the oral agreement of June 1, 1987. There was no question, either at the time of the vote or at the time of the strike, of Cuddy Boulevard employees being either asked to join in the strike or criticized for failing to do so. At the time of the strike vote, Cuddy Boulevard employees were still in the same bargaining unit as the voters, but they were not employees affected by the vote in the sense we have described in paragraph 73 above.

77. Participation in the ratification vote of June 20th was also limited to employees in the Trafalgar Road unit. Again, that unit had not acquired a separate identity at that time, unless the oral agreement of June 1st can be said to have had that effect. Collective agreements define bargaining units. The statutory definition of “collective agreement” requires that such agreements be in writing; by necessary implication, amendments to such agreements must also be in writing in order to be effective (see *University of British Columbia*, [1976] C.L.R.B.R. 13 (B.C.L.R.B.) at page 17). It is unwise to be too categorical about oral agreements having no effect in any circumstances; for the sake of analysis, however, we will assume that the oral agreement of June 1st did not effectively divide the bargaining unit.

78. On its face, the settlement which was the subject of the ratification vote applied to the entire unit covered by the 1985 agreement. Nevertheless, Cuddy and Local 175 intended it only to apply to what we have described as the Trafalgar Road unit. In the circumstances, we do not think Local 175 could have compelled Cuddy to sign an agreement in the terms of that settlement without first signing the Cuddy Boulevard agreement or otherwise excluding the Cuddy Boulevard unit

from its application. Whether or not the participants in the ratification vote might reasonably have thought otherwise, that vote was about an agreement which would only apply to the Trafalgar Road unit. The voters were not asked to ratify a division of the union's bargaining unit, and had no reason to suppose they were being asked to do so. Even if Cuddy Boulevard employees were still in the same bargaining unit as those who participated in the ratification vote when that vote occurred, they were not employees affected by the vote in the sense we have described in paragraph 73 above.

79. The complainants' argument is that the phrase "bargaining unit" in subsection 75(2) must be understood to refer to the existing unit - the bargaining unit last defined in writing by the bargaining parties - even in those rare circumstances in which, as here, the bargaining parties anticipate dividing the bargaining unit and the strike or contract which is the subject of the vote would only involve or bind one of the two units into which the existing unit is to be divided. Ordinarily, the employees in the existing unit are the employees affected by the vote in the sense we described in paragraph 73 above. It seems unlikely that the Legislature specifically turned its mind to circumstances of the sort which arose here when it decided to describe the employees to be protected by subsection 75(2) as "employees in a bargaining unit." It also seems unlikely that the Legislature intended to extend a right to participate in strike and ratification votes to employees who would not be affected by them in the sense described above. If the Legislature's choice of language nevertheless compels the conclusion that Local 175's actions here breached that subsection, the breach or breaches were technical ones which did not violate the spirit of the subsection and would not, in our view, warrant a remedial response. As we would not provide a remedy in any event, we need not decide with respect to either vote whether there was a technical breach or no breach at all.

80. We turn, then, to the complainants' arguments that Local 175 has breached section 68 of the Act. That section provides that

a trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Although complaints of breach of this section arise most often out of decisions or action taken (or not taken) in the administration of a collective agreement, the duty imposed by this section also applies to union behaviour and decision-making in the negotiation of collective agreements.

81. Section 68 does not prohibit a union's withdrawing or abandoning a grievance without the consent of the employee or employees who would benefit if the grievance were to succeed. Such action will violate the section only if the decision to so act is arbitrary, discriminatory or in bad faith. Failure to consult a grievor about the withdrawal of his or her grievance will be a breach of section 68 if the grievor, as grievors often do, has some information relevant to that decision, information which it would be arbitrary for the union to ignore: see, for example, *Jeanne St. Pierre*, [1986] OLRB Rep. June 883; and *Jean Liebman*, [1986] OLRB Rep. June 753. Mr. Dayman says this grievance was filed in order to get an appropriate collective agreement for the employees who would have benefited by success in the grievance and was abandoned because an agreement was obtained. (We note that successful pursuit of the grievance would have given the employees the benefit of the 1985 agreement only for the period from their date of hire to the end of the statutory freeze some weeks later in late May.) The settlement of a grievance is not contrary to section 68 merely because it occurs in the course of settling a collective agreement: *Stelco Inc.*, [1983] OLRB Rep. Dec. 2102. Here, both the initiation and the abandonment of the April 22nd grievance were part of the process of collective bargaining, and the propriety of Local 175's treat-

ment of the April 22nd grievance is bound up with the broader question of the propriety of Local 175's actions in bargaining the Cuddy Boulevard agreement.

82. A union may negotiate different terms and conditions of employment for different groups of employees within a bargaining unit without violating section 68, so long as there is reasonable and objective justification for the differences and the union does not act in a manner which is arbitrary, discriminatory or in bad faith in the process by which it arrives at that result: *Corporation of the City of Toronto*, [1982] OLRB Rep. Jan. 124. As the Board observed in *The Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781 at paragraph 68:

68. ... The cases are replete with passages recognizing that in the collective bargaining system trade offs must be made between the competing interests of different groups of employees. The tension as to which employees will get which slice of the wage and benefits pie negotiated with the employer is intrinsic to any union. Perhaps the best judicial recognition of that reality was made in the often quoted statement of the Supreme Court of the United States in *Ford Motor Co. v. Huffman*, [1953] 345 U.S. 330 at 338:

The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents ... Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

83. The circumstances of employees at Cuddy Boulevard were different in several respects from those of employees at Trafalgar Road. The mere fact that there are differences between the collective agreements the union made with respect to those two groups would not alone warrant a finding that Local 175 violated section 68, nor would the mere fact that Local 175 agreed to divide its bargaining unit in two. The critical question is whether in the process Local 175 followed in arriving at those results it acted in a manner which was arbitrary, discriminatory or in bad faith. The complainants' main criticism of that process is that Local 175 totally failed to consult Cuddy Boulevard employees before concluding an agreement affecting them.

84. We agree with the observation of the Board in *Manor Cleaners Ltd.*, [1983] OLRB Rep. June 929, at paragraph 9 that "it is difficult to conceive how the duty of fair representation can be discharged when the bargaining agent in an industrial setting fails entirely to meet with the employees prior to or at any time during the bargaining process." In *Diamond "Z" Association*, [1975] OLRB Rep. Oct. 791, the Board said that a breach of the duty under section 68 "most often comprehends conduct that is so wanton that the most modest of employee expectations to [sic] the benefits of collective bargaining have been betrayed by his trade union." That employees will be consulted by their bargaining agent before it concludes a collective agreement by which they will be bound is surely a most modest and reasonable employee expectation. In paragraph 23 of its decision in *Consolidated Fastfrate Limited*, [1984] OLRB Rep. May 691, the Board stated categorically that, in its application to the negotiation process, "a duty under section 68 must at least include a duty to consult at some point with those represented." If there can be circumstances in which that is not so, such circumstances are not present here. By failing to consult Cuddy Boulevard employees, Local 175 violated its duty to them under section 68 of the Act.

85. The fact that there were no employees at Cuddy Boulevard when negotiations began does not excuse the failure to consult them once there were such employees. Mr. Dayman's main excuse for not consulting Cuddy Boulevard employees thereafter was that he did not know any of them. Local 175's obligations under section 68 were owed to all employees in the unit for which it

claimed bargaining rights, not just those whom Mr. Dayman knew. He knew in April 1987 that there were employees at Cuddy Boulevard. He could have asked Cuddy who they were. He clearly would have been entitled to a full answer, for reasons which appear in the Board's decision in *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49, and decisions which have followed it, including *Radio Shack*, [1979] OLRB Rep. Dec. 1220 (jud. rev. denied, in *Re Tandy Electronics Ltd.*, and *United Steelworkers of America et al.* (1980), 30 O.R. (2d) 29, 80 CLLC 14,017 (Ont. Div. Ct.), leave to appeal to Ontario Court of Appeal refused March 10, 1980); *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *Northwest Merchants Ltd.*, [1983] OLRB Rep. July 1138, 83 CLLC 16,055; *The Windsor Star*, [1983] OLRB Rep. Dec. 2147, *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*, [1985] OLRB Rep. May 705, *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453 and *Co-Fo Concrete Forming Construction Limited*, [1987] OLRB Rep. Oct. 1213, 17 CLRBR (NS) 298.

86. The right of a bargaining agent to such information is well established and known, and Local 175's failure to exercise that right in this case highlights and compounds the union's breach of section 68. In *DeVilbiss (Canada) Limited*, *supra*, the Board observed at paragraph 16 that

... It is patently silly to have a trade union "in the dark" with respect to the fairness of an employer's offer because it has insufficient information to appreciate fully the offer's significance to those in the bargaining unit.

It is patently silly for a trade union, particularly a trade union which does not know any of the employees in the bargaining unit for which it is negotiating, to voluntarily remain in the dark with respect to employees' current rates of pay and other terms and conditions of employment. It is so silly as to constitute arbitrary conduct.

87. Section 68 does not require that trade unions consult their bargaining unit employees at every step in the bargaining process nor, generally speaking, does it dictate that their consultations shall occur at any particular stage or in any particular form: *The Great Atlantic and Pacific Company, Limited*, [1983] OLRB Rep. Oct. 1654. In addition to requiring that there be some form of consultation at some stage, however, section 68 also requires that the trade union's decisions about the timing and form of its consultation not be arbitrary, discriminatory or made in bad faith. Local 175 held a ratification vote among the Trafalgar Road employees to ascertain their wishes with respect to the terms of the memorandum of June 19, 1987. It did not conduct a ratification vote among Cuddy Boulevard employees with respect to the terms of the oral agreement of June 1, 1987. Not only has it not adequately explained its total failure to consult the Cuddy Boulevard employees, it has not adequately explained why its consultations with this group should not have taken the same form as its consultations with the Trafalgar Road employees. In the circumstances of this case, Local 175's having conducted a ratification vote in one group without doing so in the other amounted to discrimination contrary to section 68.

VI

88. What remedy should the complainants be granted with respect to Local 175's breach of its statutory duty? Subsection 89(4) of the Act sets out the Board's remedial authority:

89.-(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without

limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

We agree with counsel for the complainants that this subsection gives the Board a very broad remedial jurisdiction. In *Radio Shack, supra*, the Board made these observations about remedies:

93. It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable, they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interests of innocent bystanders. This means then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately, compliance with the Act depends on the vast majority of unions and employers according at least minimal respect to the legislation, the Board and the Board's directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the co-operation of employers and trade unions in the day to day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and of regulation. See generally St. Antoine, *A Touchstone for Labor Board Remedies* (1968), 14 Wayne L. Rev 1039; Ross, *Analysis of Administrative Process Under Taft-Hartley*, [1966] Lab. Rel. Yearbook 299. Giving effect to these general considerations, three basic principles that underpin section 79 have emerged.

The decision went on to deal with the proposition, advanced here by counsel for the complainant, that a remedy for a breach of the Act should "make whole" the injured party. While generally supporting that view, the decision did conclude that there are limits on the Board's ability to fashion such remedies (the limit in that case being that the Board was without jurisdiction under subsection 89(4) to impose a collective agreement at the request of a trade union on an employer who had violated the Act by failing to bargain in good faith with the union).

89. Insofar as the remedies sought by the complainants would result in setting aside the collective agreement, either with retrospective or just with prospective effect, the respondents argued that the Board is without jurisdiction to grant such a remedy in this case because that would adversely affect Cuddy's rights. They submitted that the Board does not have the jurisdiction

under subsection 89(4) to adversely affect the rights of any entity other than one found to have violated a provision of the Act. As this complaint had proceeded on the basis that Cuddy's behaviour, however inappropriate, was not being treated as though it violated the Act, they argued that a remedy for any breach of the Act by Local 175 would be beyond the Board's jurisdiction if it affected the legal rights of Cuddy.

90. It should be noted that the authority granted by subsection 89(4) is to "determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing." The use of the definite article "the" on the second occurrence in the subsection of the construction "employer, employers' organization, trade union, council of trade unions, person or employee" might suggest that the only entity whom the Board may order to do or refrain from doing something is the entity whom the Board has found to have violated the Act. It might be said, then, that the Board's remedial authority extends only to those remedies which may be achieved through action (or inaction) which the wrongdoer is capable of taking. A collective agreement cannot be brought to an end or made to cease to have effect, either retroactively or prospectively, by the action of only one of the parties to it (unless the action in question involves ceasing to exist without leaving a successor to its rights and obligations under section 62 or 63). Indeed, the actions of both parties to it cannot take a collective agreement out of existence even prospectively unless those actions include their applying for and obtaining the consent of the Board under section 52(3) of the Act.

91. In support of the proposition that the Board does have jurisdiction to effectively set aside a collective agreement, counsel for the complainants relied on the Board's decisions in *Traugott Construction Limited*, [1981] OLRB Rep. Nov. 1680 and [1982] OLRB Rep. June 958, and the Divisional Court's decision dismissing an application for judicial review of those decisions: *Re International Union of Operating Engineers, Local 793 and Traugott Construction Ltd.* (1984), 45 O.R. (2d) 129, 84 CLLC ¶14,025. The collective agreement there in question had been signed by the employer party to it as a result of unlawful picketing of its construction projects and threats that such picketing would continue if it did not grant voluntary recognition to the Toronto Central Ontario Building and Construction Trades Council (which had made the threats and instigated the picketing) and its affiliated trade unions and agree to be bound by the terms of certain existing collective agreements. When one of those affiliated trade unions had then sought to enforce the terms of one such collective agreement against the employer in a referral under section 124 of the Act, the Board refused to give effect to it because it was a collective agreement which had arisen "as a consequence of unlawful conduct." The Divisional Court's decision suggests that the Board could have used its remedial powers under subsection 89(4) to achieve this result.

92. The circumstances to which the Board responded in *Traugott* are distinguishable in at least one critical respect from those here. The request that a collective agreement be set aside by reason of the unlawful behaviour of one of the parties to it was made in *Traugott* by the other party to the agreement; here the other party to the agreement objects to its being set aside. The *Traugott* decisions do not assist us with the jurisdictional issue here, which only arises because of that distinction.

93. Counsel for the complainants also relied on the fact that when the Board has found a trade union to have breached section 68 in the handling of a grievance under a collective agreement, it has directed by way of remedy that the parties to the collective agreement arbitrate the grievance, thereby directly affecting rights of the employer (who may be ordered not to raise objections to the timeliness of the grievance or referral to arbitration) as well as those of the wrongdoer union. The example he offered was the decision in *Windsor Western Hospital*, [1984] OLRB Rep. Nov. 1643. Apart from the fact that the Divisional Court quashed that decision (hold-

ing that the Board was without jurisdiction to direct that a grievance proceed to arbitration when it had already been the subject of arbitration: *Re Windsor Western Hospital Centre Inc. and Mordowanec et al.* (1986), 56 O.R. (2d) 297), that example is not particularly helpful in dealing with the argument that a remedy may only affect the wrongdoer, because in that case the Board found that both the union and the employer had violated the Act. *Leonard Murphy*, [1977] OLRB Rep. Mar. 146, 77 CLLC ¶16,099, is a better example. There, the Board made these observations about what is now subsection 89(4):

34. ... Without limiting the scope of possible orders the Act specifically endorses orders to cease doing the act[s] complained of, to rectify the act[s] complained of and to reinstate and/or compensate. That the section states that such orders may be made "notwithstanding the provisions of any collective agreement" implies that an order may override the terms of the collective agreement and thereby affect parties other than the specific offender. The breadth and flexibility of the remedial powers given the Board under section 79 [now 89] enable the Board to respond directly to a specific violation of the Act and to as nearly as possible put the parties into the position they would have been in if the violation of the Act had not occurred [sic].

The Board went on to make a direction that the parties arbitrate the grievance, noting that this overrode certain provisions of the collective agreement which might otherwise have made the grievance inarbitrable. Similar orders have been made in other subsequent decisions: *Consumers Glass Company Limited*, [1979] OLRB Rep. Sept. 861, *Corporation of the Town of Hastings*, [1979] OLRB Rep. Nov. 1072, *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338, *North York General Hospital*, [1982] OLRB Rep. Aug. 1190, *Phillip Wayne Bradley*, [1983] OLRB Rep. Mar. 323, *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, *Central Stampings Limited*, [1984] OLRB Rep. Feb. 215, *J. M. Schneider Inc.*, [1984] OLRB Rep. Mar. 467 and *The Corporation of the Town of Oakville*, [1984] OLRB Rep. May 731.

94. The Board's jurisdiction to make orders of that kind is not in question here. It seems to us that there is a substantial difference between a power to override, on a one-time basis, a provision or two of a collective agreement in their application to a particular grievance and a power to bring an entire collective agreement to an end for all purposes. To suggest that the latter power has the same basis in the language of subsection 89(4) as the former puts considerable strain on the words "notwithstanding the provisions of any collective agreement" in subsection 89(4).

95. If the Board has the power to set aside a collective agreement by way of remedy for the unfair labour practice of only one party to it over the objection of the other party, it is a power which should be used with extreme caution and only in compelling circumstances. For one thing, the retroactive elimination of a collective agreement which has been in force for any period of time would create a number of complex problems, not the least of which is whether the employees covered by it would then be obliged to return to the employer all wage increases and other benefits received under the agreement: see *Cara Operations Limited*, [1986] OLRB Rep. Aug. 1054 at paragraph 16. Beyond the difficulty of implementing such a remedy in any given case, there is the adverse effect that the mere availability of the remedy would have on the collective bargaining process.

96. The Act requires that the parties to a collective bargaining relationship bargain in good faith and make every reasonable effort to make a collective agreement. It holds out the promise that an agreement achieved by those efforts will be binding on the employer, the union and the employees for its full term (or the first three years of its term, at least: see subsections 5(5) and 56(1) and subsections 57(2)(b) and 57(6)). For its part, the employer is obliged to recognize the trade union's authority to bargain for all employees in the unit in question. The Board's jurisprudence time and again has told employers that so long as the union continues to have that authority, the employer must not question or interfere in or attempt to dictate the way the union consults

with or represents those employees. An employer violates the Act, for example, if it insists on employee ratification as a precondition to its executing a collective agreement which the union is prepared to execute: *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337. That would be an unfair restriction on an employer if it were liable to lose the benefit of any bargain it might strike because of some inadequacy in the way the trade union dealt with bargaining unit employees. The collective bargaining process as it is presently understood would be undermined by the introduction of any notion that an employer who has in no way violated the Act could nevertheless lose all of the fruits of its bargaining because the union whose authority it had been obliged to unquestioningly recognize was later found to have inadequately represented the interests of the employees bound by the agreement.

97. Counsel for the complainants argues that if it would be inappropriate, generally speaking, to exercise against an innocent employer a jurisdiction to set aside a collective agreement, it nevertheless would be appropriate to do so here because this employer is “complicit” by reason of its misrepresentations to Cuddy Boulevard employees. The Concise Oxford Dictionary defines “complicity” as “partnership in an evil action.” Cuddy certainly acted deceitfully when it withheld from its Cuddy Boulevard employees the fact that Local 175 claimed the right to represent them in collective bargaining. There is no evidence, however, that Cuddy did that at Local 175’s request or as part of some agreement or conspiracy with Local 175. There is no evidence that Cuddy caused or encouraged Local 175’s failure to communicate with Cuddy Boulevard employees before binding them to the terms of a collective agreement. While some of those employees might have contacted Local 175 if Cuddy had told them the truth, Cuddy’s misrepresentations to the employees did not prevent Local 175 from communicating with them. While Cuddy behaved inappropriately, it was not “complicit” in Local 175’s breach of section 68.

98. If the Board does have jurisdiction to set aside a collective agreement over the objection of a party to it who has not been found in breach of any provision of the Act, it is not a jurisdiction which should be exercised in the circumstances of this case. That disposes of the first four of the remedial alternatives listed in paragraph 70 above.

99. As for the fifth of the complainants’ proposed remedies, there are two reasons why we should not remedy Local 175’s breach of section 68 by substituting RWDSU for Local 175 as the trade union party to the collective agreement upon a majority vote of Cuddy Boulevard employees: that would be beyond our remedial authority and, even if it were not, it is not an appropriate remedy for this breach.

100. This proposed remedy would involve the Board’s conferring on one trade union bargaining rights presently held by another. The Act carefully describes and circumscribes the circumstances in which the Board has the power to confer bargaining rights through certification (sections 7, 8, 9 and 144) or successorship declaration (section 62). None of those powers is exercisable in these circumstances. As we interpret the Act, those express powers to confer bargaining rights are the Board’s only such powers. We also note in this regard that while labour legislation in other Canadian jurisdictions expressly contemplates a raiding union’s stepping into the shoes of an incumbent under the latter’s collective agreement in certain circumstances, that notion is quite foreign to our Act (see section 56(1)) except in the successorship context. We conclude that, like the power to impose collective agreement terms not agreed to by the parties, the power to confer bargaining rights and the power to substitute one trade union for another in a collective agreement are not included in the Board’s remedial powers under subsection 89(4).

101. Even if it were within our jurisdiction to grant it, this remedy would not be an appropriate remedy for Local 175’s breach. It was argued that this remedy was a way to restore the employ-

ees' opportunity to select their own bargaining agent if that could not be achieved by setting aside the Cuddy Boulevard agreement. The premise of the argument is that Local 175's breach of section 68 resulted in the loss of that opportunity. That premise is incorrect.

102. In our oral ruling of November 27, 1987, we said that Local 175's bargaining rights with respect to Cuddy Boulevard employees had been vulnerable to termination or displacement until the Cuddy Boulevard agreement was signed. That finding was not essential to the conclusion expressed in that ruling and, as counsel for Local 175 later pointed out, it was incorrect. The appointment of a conciliation officer on March 11, 1987, closed the "open period". For 12 months thereafter no certification or termination application could be made with respect to any employees in the unit covered by the 1985 agreement, including employees at Cuddy Boulevard: see subsection 61(2) of the Act. That bar was in place before there were any employees at Cuddy Boulevard. Local 175's breach occurred after that. That breach was its failure to consult with Cuddy Boulevard employees at some time before concluding an agreement covering them. We cannot say that if Local 175 *had* consulted those employees it could not have concluded a collective agreement covering Cuddy Boulevard employees before March 11, 1988 without breaching section 68 in some other way. Accordingly, we cannot say that the complainants lost any opportunity to select a bargaining agent as a result of Local 175's breach of section 68. A remedy designed to create such an opportunity would not be an appropriate remedy for Local 175's breach.

103. What the complainants lost was the opportunity to be consulted, to speak to Local 175 about the subject matter of a collective agreement before one was agreed to by Local 175 on their behalf. Can or should that loss be compensated in money? Counsel for Local 175 says that any assessment of damages would be highly speculative. He argues that we do not know that the Cuddy Boulevard employees would not have ratified the terms of the agreement. He submits they might have, even though the agreement gave few of them any immediate improvement in the terms and conditions of employment, because they would not have gone to work at Cuddy Boulevard in April 1987 if they were not satisfied with the wages and working conditions which existed both then and in June. He submits that we do not know whether the Cuddy Boulevard employees would have been prepared to go on strike to achieve something more. He cites *Clifford Renaud*, [1976] OLRB Rep. Jan. 967, in which the parties had agreed that if the Board found a violation of section 68 (then section 60), the question of monetary compensation should be dealt with at a later date. While the Board did find a violation, it declined to enter into an assessment of damages because it "would ... be of such a speculative and nebulous nature such that further protracted hearings in this regard could not be justified."

104. The Board dealt in *Radio Shack, supra*, with the proposition that the Board should avoid awarding damages for a loss of opportunity because the calculation of them would be too speculative:

101. It can, of course, be argued that damages for the loss of such an opportunity are too speculative to estimate and if arbitrarily set would be punitive in nature - a result that would appear to contravene the first tenet discussed. The argument, however, is inconsistent with the long accepted principle that one whose wrongful act precludes the exact determination of damage should not be able to evade his duty to compensate for that damage because of an uncertainty caused by his own wrongdoing. See *Mayne and McGregor on Damages* 12th ed., 1961, para. 174. In private litigation before our courts, a party is not burdened with an unattainable standard of accuracy in the assessment of damages. Business losses in commercial law suits and the compensation awarded in personal injury cases to persons who may never have been employed are important examples. See for example: *Withers v. General Theatre Corporation*, [1933] 2 K.B. 536; *Roach v. Yates*, [1938] 1 K.B. 256 (C.A.). Even more directly in point are those cases that explicitly grapple with the wrongful loss of an economic opportunity.

After reviewing several such cases, the Board concluded:

111. If the courts have not shied away from attempting to provide effective monetary relief for the violation of private rights, should the Ontario Labour Relations Board be any less sensitive when confronted with the intentional defiance of statutory policy? The answer must surely be in the negative unless this approach conflicts fundamentally with more important principles and we do not think this is the case.

The appropriateness of an award of damages for a loss of opportunity caused by a breach of the Act was reaffirmed in *Canada Cement Lafarge Ltd.*, [1981] OLRB Rep. Dec. 1722 and *Consolidated Bathurst Packaging Ltd.*, [1984] OLRB Rep. Mar. 422.

105. The three decisions to which we have just referred were concerned with remedy for breach by one of the bargaining parties of the duty to bargain in good faith and make every reasonable effort to make a collective agreement. In *The Corporation of the City of Thunder Bay*, [1984] OLRB Rep. May 759, the Board found that a trade union had violated section 68 by misleading bargaining unit employees about the content of an offer which had been made by the employer during collective bargaining, action which the Board had earlier found (at [1983] OLRB rep. May 781) had been calculated to foreclose discussion or consideration within the bargaining unit of matters of particular interest to the complainants in that case. Those complainants would have received a higher rate of pay under the terms of the employer offer which had been wrongfully concealed than they received under the agreement the union ultimately made with the employer. The complainants asked that the union be ordered to pay them the difference between those two rates as damages.

106. The Board found that a causal connection between the union's breach of section 68 and the wage settlement finally adopted by the union was not established. In that context, it made these observations:

26. While the Board has indicated that where appropriate compensation will be awarded in respect of lost opportunity, the value of the opportunity lost must be realistically assessed, and the amount of compensation awarded must be a fair reflection of that value. Compensation for lost opportunity, like all heads of compensation, should not amount to punitive or exemplary damages, nor should it be a windfall which would not in any event have been enjoyed by the complaining party.

27. We are compelled to conclude, on the balance of probabilities, that no practical difference would have resulted if Ms. Rice and the other members of the bargaining committee had disclosed the alternative offer when they were asked about it in the general membership meeting by Mr. Roy and Mr. Zapior. In other words, we are satisfied, on the preponderance of the evidence, that the wage outcome affecting the complainants did not flow from the violation of the duty of fair representation. We also doubt the remedial value of making an order of compensation which would, in effect, amount to a transfer of money from one group of employees to another. The wage compression itself was not a violation of the Act. The duty of fair representation was breached by the misrepresentation and procedural maneuvering of a small group of individuals who have since forfeited their office. In these circumstances, the payment of damages sought by the complainants would be tantamount to compensating them for their losses resulting from wage compression. Moreover, given our conclusion that the bargaining unit should not be severed, we must have additional concerns. Any compensation ordered would be paid by the members of the Local. In these circumstances we seriously doubt the wisdom of an order whose practical effect will be to take money from one group of employees - who did not themselves commit the unfair labour practice - and put it into the pocket of the complainants. Quite apart from the impropriety of that order, it would in all likelihood exacerbate rather than heal the differences between these two groups. It would have a negative effect from a labour relations standpoint. In light of the Board's conclusion on the issue of compensation it is not necessary to deal with the alternative argument of the respondent union in respect of delay.

The finding in the second sentence of paragraph 27 was a sufficient basis for the Board's conclusion that no damages should be awarded. It is not clear whether or to what extent the observations which follow that sentence are meant to cast a doubt on the propriety or remedial value of an award of damages otherwise than in the particular circumstances of that case. They might be taken to express a general proposition that a union should not be ordered to pay to employees such damages as can be shown to flow from the union's breach of the Act if those damages might ultimately be paid out of funds collected from union members who are fellow employees of the successful complainants. If they do, we respectfully disagree. No one would for a moment suggest that a corporate wrongdoer should not pay damages because the funds to pay them come ultimately from shareholders or customers who were not participants in the corporation's wrongdoing, nor that an individual who breaches the Act should not pay compensation to his or her victim because the funds to do so might otherwise have been enjoyed by dependents of the wrongdoer who had not themselves participated in the wrongdoing. Giving effect to a claim for damages by one party to a collective bargaining relationship against the other can indeed have a negative effect on their labour relations: no one likes to be made to pay, and that dislike will be focused on the claimant who seeks the payment. That is not ordinarily a basis for refusing to grant a remedy in damages in other unfair labour practice contexts.

107. If prior consultation with Cuddy Boulevard employees would ultimately have resulted in a Cuddy Boulevard agreement more advantageous to the complainants than the existing one, then Local 175 should be made to pay damages to the complainants equal to the amount by which their wages and benefits fall short of what they would have been. It is admittedly difficult to know with any certainty what would have been the ultimate result of consultation. That depends on the answer to several difficult questions. Would the Cuddy Boulevard employees have ratified the terms arrived at on June 1, 1987? If not, would Local 175 have gone back to ask for more without a strike mandate? Would the Cuddy Boulevard employees have been prepared to go on strike? Would the parties have settled on improved terms without a strike? Would the value to the complainants of the improvements, if any, won by striking have outweighed the costs to the complainants of the strike?

108. Local 175's breach of section 68 is the reason why we do not know with certainty whether the Cuddy Boulevard employees would have ratified the terms of the existing Cuddy Boulevard agreement or been willing to go on strike for more. It is rather unusual for a union to suggest, as Local 175 did in argument, that employees are unlikely to be interested in collective action to improve wages and working conditions because if they did not like the wages and working conditions currently provided by their employer they would not be working for that employer. A contrary assumption is ordinarily the basis of union organizing. On the evidence before us, by late May or early June some Cuddy Boulevard employees were interested enough in collective bargaining to discuss the possibility in the presence of, and with, members of Cuddy's management. Counsel for Local 175 repeatedly suggested to witnesses that they would not have been upset, as Cuddy Boulevard employees were at their first meeting with Mr. Dayman, if the wage rates and other provisions of the Cuddy Boulevard agreement had been the same as in the new Trafalgar Road agreement. While Local 175's failure to consult them was also a factor in their anger, that anger and the speed with which so many of them joined the RWDSU lead us to conclude it is most unlikely that the Cuddy Boulevard employees would have ratified an agreement which provided for wage rates lower than those in the expired 1985 agreement and gave them no immediate wage increase. When consulted, they would have urged Local 175 to get them more and, we believe, would have indicated a willingness to take strike action to get more. It seems most unlikely that Local 175 would have done nothing more in those circumstances. It would have gone back for more.

109. Local 175's breach of section 68 is the reason why we do not know with certainty what more Local 175 could have got before or after carrying through on a strike threat. The uncertainty which is necessarily involved in making that determination is, therefore, no reason to avoid it. There is one thing we can say without much difficulty: it is most unlikely that Local 175 would have got as much in the Cuddy Boulevard agreement as it did get in the Trafalgar Road agreement. In addition to the distinguishing considerations articulated by Mr. Dayman, each of which had some validity, there is another consideration he and counsel for Local 175 would have been disinclined to articulate in the circumstances: getting more for the Cuddy Boulevard employees might have involved getting less for the Trafalgar Road group.

110. Accordingly, while we find that the 26 complainants are entitled to damages, we do not accept their counsel's submission that the measure of those damages is the difference between what they have been receiving under the current Cuddy Boulevard and what they would have been receiving under the current Trafalgar Road agreement if it covered them. Their damages are some fraction of that. We will determine what that fraction is if necessary, but it would be very much in the best interests of the affected parties - the 26 complainants and Local 175 - if they were to settle this last issue themselves.

111. Accordingly,

- (a) We direct that Local 175 shall forthwith post copies of the attached notice marked "Appendix", duly signed by representatives of the respondent, on each and every of the bulletin boards and other locations in the Cuddy Boulevard plant which are ordinarily available to it for the posting of notices. The respondents shall keep the notices posted for 60 consecutive working days, and shall take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material. To the extent that the respondent's use of bulletin boards and other locations is subject to a requirement that Cuddy approve the material the respondents propose to post, then Cuddy is hereby directed (pursuant to clause 103(2)(d) of the Act) to do whatever is necessary to ensure that the posting provided for in this paragraph is carried out.
- (b) We direct that duly authorized representatives of the complainants and the respondent Local 175 shall meet with a labour relations officer designated by the Board's Manager of Field Services at a time and place appointed by that officer to attempt to settle the remaining question of the amount of damages to be paid by Local 175 to the complainants.

Unless within thirty days after the meeting date first appointed by the labour relations officer one of the affected parties requests that we render a more detailed decision with respect to the matter of damages, the Board's proceedings in connection with the complaint will be treated as at an end.

112. It follows from our disposition of the complaint that the certification application must be dismissed as untimely insofar as it affects the employees covered by the Cuddy Boulevard agreement, namely

all employees of Cuddy Food Products Ltd., 10 Cuddy Boulevard, London, Ontario save and except supervisors, persons above the rank of supervisor,

nurses, office and sales staff, student in the school vacation period, and persons employed for not more than twenty-four (24) hours per week.

We note that the unit RWDSU described in its application as appropriate did not exclude persons employed for not more than twenty-four hours per week ("part-time employees") or students employed during the school vacation period ("students"). The application is timely with respect to a unit of part-time employees and students. No part-time employees or students were shown on the schedules filed by Cuddy as employed on the application date, however. We do not know whether RWDSU claims that there were such employees on that date. If it does, it should so advise the Registrar within 14 days of the release of this decision and request that the certification application be relisted for hearing. If no such communication is received within that time, the certification application will be dismissed.

Labour Relations Act

NOTICE TO EMPLOYEES**Posted by Order of the Ontario Labour Relations Board**

WE, THE UNITED FOOD AND COMMERCIAL WORKERS' INTERNATIONAL UNION, LOCAL 175, HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT IN 1987 BY FAILING TO CONSULT WITH PERSONS EMPLOYED BY CUDDY FOOD PRODUCTS LTD. AT ITS PLANT AT 10 CUDDY BOULEVARD IN THE CITY OF LONDON BEFORE ENTERING INTO THE CURRENT COLLECTIVE AGREEMENT COVERING EMPLOYEES AT THAT LOCATION.

THE BOARD HAS ORDERED US TO INFORM ALL EMPLOYEES IN THE BARGAINING UNIT OF THEIR RIGHTS.

THE LABOUR RELATIONS ACT GIVES EMPLOYEES IN A BARGAINING UNIT REPRESENTED BY A TRADE UNION THE RIGHT TO BE REPRESENTED IN A MANNER THAT IS NOT ARBITRARY, DISCRIMINATORY OR IN BAD FAITH, WHETHER OR NOT THEY ARE MEMBERS OF THAT TRADE UNION.

WE ASSURE ALL EMPLOYEES REPRESENTED BY THE UNITED FOOD AND COMMERCIAL WORKERS' INTERNATIONAL UNION, LOCAL 175, THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THIS RIGHT.

WE WILL NOT ENGAGE IN ANY CONDUCT THAT IS ARBITRARY, DISCRIMINATORY OR IN BAD FAITH IN THE REPRESENTATION OF ANY EMPLOYEE WE REPRESENT.

WE WILL COMPLY WITH ALL ORDERS OF THE ONTARIO LABOUR RELATIONS BOARD WITH RESPECT TO OUR BREACH OF THE ACT.

THE UNITED FOOD AND COMMERCIAL WORKERS'
INTERNATIONAL UNION, LOCAL 175

PER: _____
AUTHORIZED REPRESENTATIVE

PER: _____
AUTHORIZED REPRESENTATIVE

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 9TH day of DECEMBER, 1988.

0910-88-U National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), Complainant v. Del Equipment Limited, Del Hydraulics Limited and Edinburgh Electric Limited, Respondents

Interference in Trade Unions - Remedies - Unfair Labour Practice - Employees seeking permission to leave work early to attend strike preparation meeting - Permission to leave refused or revoked - Employees suspended for two to three days on grounds of insubordination after leaving work without permission - Unfair labour practice complaint dismissed - Board jurisprudence indicating that interests must be balanced - Board not determining whether Act violated because it would not in any event grant the remedies requested by the union

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *M. Rozenberg* and *H. Peacock*.

APPEARANCES: *Daniel Harris* and *Jane Armstrong* for the complainant; *Robert W. Little*, *Paul Martin* and *David Martin* for the respondents.

DECISION OF THE BOARD; December 9, 1988

1. In accordance with the Board's decision of April 19, 1988 and upon the agreement of the parties, the name of the respondent is amended to read: "Del Equipment Limited, Del Hydraulics Limited and Edinburgh Electric Limited".
2. This is a complaint under section 89 of the Act alleging that the respondents have violated sections 64, 66(a), 66(c), 70 and 75 of the *Labour Relations Act* by suspending a number of employees in July of 1988 for periods of two to three days on the grounds of insubordination.
3. The respondent Del Equipment Limited ("Del Equipment") employs approximately 140 employees in the manufacture and installation of heavy truck bodies and other components. The respondent Edinburgh Electric Limited ("Edinburgh") employs approximately 35 employees in the manufacture of hydraulic tailgate loaders. Del Hydraulics Limited, which purchases, sells and services hydraulic components at present has no employees. The three companies, which share premises on Laird Drive, were found to be related or associated employers within the meaning of section 1(4) of the *Labour Relations Act* by a differently constituted panel on April 19, 1988 which directed that they be treated as constituting one employer. The events which form the subject of this complaint relate to employees of Del Equipment and Edinburgh.
4. Paul Martin is the president of Del Equipment. Below him is John Hickling, the plant manager, and a number of foremen, including Gino Tonon and Faroon Mohamed. Paul Martin's brother, David Martin, is the secretary of Edinburgh Electric which he also runs on a day-to-day basis. Below him is Richard Olins, who is described as a plant manager, and foremen who include Robert Tonan.
5. The complainant commenced organizing employees at this location in March of 1987. An application for certification was filed in September of 1987, although a certificate was not issued until April of 1988 as a result of the related employer proceedings referred to above. The complainant acknowledged that it does not rely on any history of unfair labour practices on the part of the respondent in the instant complaint.
6. At the time of these events, the parties were engaged in negotiations for a first collective agreement. A negotiating meeting had been scheduled for Friday, July 8, 1988. It was at least the perception of some of the employees who were involved in these events that the respondent

had failed to show up for that meeting, although it is not at all clear what in fact occurred. On Friday, the union's negotiating committee decided to schedule a meeting for the following Monday after 12:00 p.m. The purpose of the meeting was to prepare for what appeared to be an impending strike, and the employees involved included both the members of the negotiating committee and other employees whom it was anticipated would be part of the strike committee for a total of twelve in all. The meeting was to be held at the union's hall in Scarborough. The parties were in a position to legally strike or lock-out on Thursday, July 14, 1988.

7. On Monday, July 11, 1988, shortly before or at the beginning of the work shift, some members of the negotiating committee advised those employees who were not already aware of it of the meeting. Employees then set about obtaining the permission of their respective foremen to leave at noon. It appears that in the past, when employees were required to attend the related employer hearings on behalf of the union, the union would advise the respondent in advance by telex. At the time of the first negotiating session, the unit was serviced by international staff representative William Heeley who notified the respondents by letter on one occasion when employees on the union's negotiating committee were required for a negotiating preparation meeting. Subsequently, international staff representative Ted Murphy assumed Mr. Heeley's responsibilities with respect to this bargaining unit, and from that time on it appears employees who required time off for union meetings asked their respective foremen for permission. In many cases, the respondent was aware of these meetings in any event because employees were meeting with the respondents, for example, in occupational health and safety meetings or contract negotiation meetings. As a result, the respondent would advise the foremen involved that time off would be required for certain employees working under them. The evidence was also that employees who required time off in general terms usually approached their foremen for permission. Prior to July 11th, the respondents had never denied a request for time off for union business. The union had also held a number of union meetings of various kinds which were scheduled outside of normal working hours. All employees work one shift from 8:00 a.m. to 4:30 p.m.

8. A great deal of evidence was lead with respect to how and whether permission was obtained from various foremen, which was not ultimately particularly significant. Suffice it to say that the employees who worked under foreman Gino Tonon probably received permission for the time off requested. Other employees working under foremen Robert Tonan and Faroon Mohamed may have been told something more conditional. In any event, David Martin was advised by Robert Tonan at approximately 8:30 a.m. or 9:00 a.m. on Monday, July 11th that two employees were leaving at noon. He told Mr. Tonan that they were on the negotiating committee and to let them go. At around 10:00 a.m. or 10:30 a.m., John Hickling contacted Mr. Martin and asked him if they had to let employees off. Mr. Hickling had been notified of one employee in particular working under Faroon Mohamed who had requested time off and had understood from Mr. Mohamed that more than one employee was involved. When Mr. Martin replied that the employees were on the negotiating committee, Mr. Hickling responded that there were more employees than that, and that there were also strike captains. Mr. Martin told him that that was a whole different set of facts, and that they would have to look into it.

9. David Martin then discussed the matter with Paul Martin, their father, Jack Martin, and their counsel. David Martin testified that they would not have refused permission for employees to leave work for a negotiating meeting. However, because of the greater number of employees involved and because the meeting was nothing to do with negotiations but involved the strike captains, they decided not to allow employees to have time off. Both were of the view that employees were needed in the plant in light of the impending strike.

10. The refusal to grant time off (or in some cases the revocation of the permission already

given by foremen) was communicated to foremen and the employees involved in various ways shortly before twelve o'clock when employees were to leave. While a number of employees were confused and upset at this turn of events, we are satisfied that all were aware that permission to leave had either been refused or revoked. After Jack Noble, the union's negotiating committee chairman, had spoken to both Mr. Hickling and Ted Murphy, the employees decided to attend the meeting anyway. At least two employees were told that it was likely that they would be disciplined. The employees involved punched out and left work for the day.

11. David and Paul Martin then reconvened to discuss what they would do next. At that point, they felt that the gauntlet had been thrown down and that they had to respond to what they considered to be blatant insubordination. They decided to impose suspensions on employees of two days each. Two lead hands involved were suspended for three days each. Employees were advised of suspensions either by telephone that evening or in person the following morning. They were told to come in to pick up their suspension letters and their tools. Those that did so were then escorted by management out of the plant. At least two employees were told not to walk through the plant. The effect of the suspensions was to remove the bargaining committee and the strike committee from the plant for the two days prior to the commencement of the strike. A legal strike commenced on July 14th and continued as of the date of the hearings.

12. Sections 64, 66(a) and 66(c), sections 70 and 75 provide as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

...

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

75. No employer or employers' organization shall call or authorize or threaten to call or authorize an unlawful lock-out and no officer, official or agent of an employer or employers' organiza-

tion shall counsel, procure, support or encourage an unlawful lock-out or threaten an unlawful lock-out.

13. In addition, section 1(1)(k) of the *Labour Relations Act* provides this definition of a lock-out:

1.-(1) In this Act,

...

- (k) "lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees;

...

14. The complainant alleges that both the refusal or revocation of permission for time off and the subsequent discipline amount to violations of these sections. Among other things, counsel argued that the granting and revocation of permission was intended to demean the complainant in the eyes of employees, and that the respondent first provoked employees, and then took the opportunity to impose discipline which would remove the bargaining and strike committees from normal contact with other employees. In his view the revocation or refusal of permission also amounted to an interference with the administration of the union or the representation of employees by the union, and the discipline imposed both penalized employees for exercising rights under the Act and amounted to an illegal lockout.

15. Counsel for the respondent argued among other things that employees had no statutory right to time off during working hours, and that the respondent was legitimately motivated by its production needs. In his view, the discipline imposed was a reasonable response to the flagrant insubordination of employees, and not only did it not amount to an illegal lockout, but the planned exodus of the employees involved could constitute an illegal strike.

16. While there is no doubt that employees in this case have defied or resisted the respondent's instructions, the Board has made it clear in the past that this is not a complete answer to a complaint. Firstly, the Board must be satisfied that even if legitimate reasons exist for the respondent's actions, they are not tainted by the co-existence of improper motives (see for example, the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745). Secondly, an employer cannot shelter behind insubordination doctrines if the instructions or rule resisted by an employee prohibit him or her from exercising rights under the Act. (See, for example, *Associated Medicine Services Inc.*, 64 CLLC ¶16,503; *Consolidated Fastfrate Limited*, [1980] OLRB Rep. April 418.) In other words, an employer cannot do indirectly what it is prohibited from doing directly. As a result, our scrutiny in this case must extend to both the refusal or revocation of permission and the subsequent imposition of discipline.

17. Turning first to the revocation or refusal of permission, in considering the scope of employee rights in the context of sections 64, 66 and 70, the Board has frequently had recourse to section 3 of the Act which provides as follows:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

18. There was no dispute that the parties were in a legal strike/lock-out position as of July 14, 1988 and that the strike preparation meeting was lawful union activity. What counsel for the respondent argues is that the employees have no right to engage in such activities during working hours. We find this statement too categorical. In our view, counsel's alternative submission that the Board's approach is one of balancing interests is a more accurate characterization of the jurisprudence. (See, for example, *Consolidated Fastfrate*, *supra*; *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316; *T. Eaton Company Limited*, [1985] OLRB Rep. June 941.) More specifically, the Board has inferred a restriction in favour of the employer's production interests into the scope of what are considered employee rights under the Act, and has said that the Board must attempt to ascertain the proper point of accommodation in each case. (See *International Wallcoverings*, *supra*, and *T. Eaton Company*, *supra*.)

19. In applying this approach to the case before us, we note the following salient features. While it was undoubtedly more efficient and convenient for the union to hold its meetings during working hours in terms of employee participation, the only reason cited by the union for the timing of this particular meeting was that it was the only time Mr. Murphy had available. In fact, this information was gleaned in cross-examination of one of the union's witnesses by the respondent's counsel. Mr. Murphy himself testified for the union without mentioning it. All employees work the same shift in this plant, and it was not disputed that meetings had been held at the end of the working day on previous occasions. The evidence indicates that no attempt was made to either schedule the meeting outside working hours or reschedule it upon the cancellation of permission, even though Mr. Noble was in contact with both the employees involved at the time and Mr. Murphy. Neither was the respondent approached and presented with reasons why it was important to hold the meeting as previously scheduled. There was no suggestion that the meeting could not be rescheduled or that the holding of it outside of working hours would either significantly limit or effectively deprive employees of their opportunity to participate in this kind of activity.

20. At the same time it was also apparent that when the respondent decided to withhold or revoke permission, no attempt was made to consider whether the specific employees involved were actually required and the exact number of employees requesting leave was unknown. It appears that orders were relatively normal at this time as was with the backlog, no overtime was being worked at least at Del Equipment (although some was being worked at Edinburgh Electric) and that none of the foremen, the plant managers, David Martin or Paul Martin knew the number of employees who wanted time off or their respective functions at the time they made their decision. It was also evident that no attempt was made to investigate or consider whether the employees involved were in fact required for work on the afternoon in question. This resulted in some anomalies. For example, one employee who was refused permission to leave was actually assigned to light work chipping paint off a table on the date in question as a result of an injury, and was not working on production at all. Indeed, the facts before us demonstrate that the respondent was as cavalier about the union's arrangements as the union was about the respondent's needs. In these circumstances, it is difficult to say that one party's interests or requirements should necessarily or self-evidently take precedence over the other's.

21. This is particularly problematic in light of the evidence with respect to the respondent's intention. In our view, the evidence does not support the proposition that the granting and revocation of permission was calculated to demean the union. To the extent that permission was granted by foremen, it was done as a routine matter on the basis of a previous practice and a more general procedure with respect to the granting of time off. It was only when upper management became aware of the requests that permission was refused or revoked because the Messrs. Martin decided that the situation was different from that of granting time off for bargaining committee members. While we agree with counsel's submission that management speaks with one voice and that the

foremen represented management at the time they granted permission, it does not follow that management must be consistent. Although consistency may be a relevant factor in inferring motivation, in this case, at least part of the reason for the confusion within management was the manner in which permission was obtained. There was no obligation on the union to seek permission from upper management in particular and for all twelve employees at once; on the other hand the method of employees approaching their own foremen certainly contributed, if not largely caused, the inconsistency displayed by management. And while as we have said, the respondent's assessment of its own needs for the employees in question was hasty and vague, it was not an unreasonable assumption on the Martins' part that as a general proposition, they required all their employees to get out as much production as possible in the days preceding the strike. Having had the opportunity to hear at some length from both Paul and David Martin, we are not persuaded that there was anything more to the granting and refusal of permission than the reasons stipulated, that is, that when they became aware of the facts, they determined not to let employees go because of the number of employees who were involved and because of the nature of the meeting. However, the inconsistency within management and the vagueness with respect to the respondent's assessment of its manpower requirements does tend to underscore the prominence of this second reason with respect to the nature of the meeting.

22. We do have some concerns about the role of this second reason in the context of section 64. It was evident from David Martin's testimony that the Messrs. Martin did not feel that they should have to facilitate the union's preparations for a strike of their plant. While we can understand that feeling, the fact is that an employer who makes decisions on the basis of the nature of the union activity involved (as opposed to its own production requirements) may be skating on thin ice when it comes to a prohibition against interfering with the administration of a union. The number of employees who wished to leave was indeed the Martins' business, both figuratively and literally; the nature of the meeting in question was not, once it was clear that it was a lawful union activity.

23. With respect to the imposition of discipline, we note that the nature of the discipline imposed tends to further undermine the assertion that employees were required for production, given that it had the effect of removing them from production for the entire period before the strike. However, there are a limited number of disciplinary responses available to the employer, and the one imposed was certainly consistent enough with arbitral jurisprudence and the circumstances of the case that it does not in itself raise some suspicion of an ulterior motive. We do find it somewhat disingenuous on the part of the Messrs. Martin to say that they did not consider the advantage to them of removing the bargaining committee and the strike committee from the plant for the period prior to the strike. We note as well that the Board is prepared to infer in some circumstances that an obvious impact must have been intended. In this case, however, the discipline imposed was also a plausible response to the actions of employees.

24. Ultimately, we find that it is not necessary for us to decide whether the respondent has violated the Act, as we have determined that we would not, in any event, grant the remedies requested by the union. In our view, it is evident that the union was largely the author of its own misfortune in this matter. The respondent's disciplinary response was entirely predictable, and while the refusal or revocation of permission was undoubtedly frustrating for employees, the respondent's lack of wisdom in this regard was only equalled by the union's. In the absence of a cogent explanation for why the meeting had to be scheduled at that particular time and held precisely as scheduled, we are far from convinced that the union should be protected from the consequences of its own rash actions. We understand that the parties were in part acting out reciprocal manoeuvres in a tense pre-strike climate without the benefit of an established labour relationship. However, while it may be somewhat artificial to say that parties on the brink of economic confron-

tation should conduct themselves in a mature manner, it is also apparent that a degree of restraint and level-headedness in these circumstances is contemplated by the scheme of the Act.

25. We would note in passing that at least some of the employees involved appeared to be unclear on their respective rights and obligations vis-a-vis their employer and their union where there was a conflict between the two. Given that both parties share the responsibility for this sequence of events, at some point in the future they may wish to consider whether the suspensions have served their purpose.

26. We do not suggest that a complainant's hands must be spotless to obtain a remedy for a violation of the Act on the part of another party, or that employees are not entitled to stand on their statutory rights in some circumstances in the face of their employer's instructions. Rather, it is our view that in all the circumstances of this case, we are not persuaded that the remedies requested are appropriate. As a result, the complaint is dismissed.

3291-86-R; 3457-86-R; 0250-87-R United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Ellis-Don Limited**, Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. The Form Work Council of Ontario, Intervener #2 v. Metropolitan Toronto Apartment Builders Association, Intervener. #3; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Milne & Nicholls Ltd., Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. Metropolitan Toronto Apartment Builders Association, Intervener #2; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Mollenhauer Limited, Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. Metropolitan Toronto Apartment Builders Association, Intervener #2

Bargaining Unit - Certification - Construction Industry - Whether the collective agreement between MTABA and Labourers Union with respect to the construction of apartment buildings covers carpenters and carpenters apprentices - Issue determined in prior proceeding - *Res judicata* not applicable because different parties - Employees in issue not covered by MTABA agreement - Whether Carpenters Union can carve out its craft from concrete forming agreement - Board discussing its displacement policy - Carpenters Union permitted to carve out its craft

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members D. A. MacDonald and P. V. Grasso.

APPEARANCES: Douglas J. Wray and David McKee for the United Brotherhood of Carpenters Local 27; W. Thornton for Ellis-Don Limited, Milne & Nicholls Ltd. and Mollenhauer Limited; A. M. Minsky for Labourers' Local 183 and The Form Work Council of Ontario; Doug Gilbert for the Metropolitan Toronto Apartment Builders Association.

DECISION OF THE BOARD; December 8, 1988

1. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

2. These applications for certification are made under the construction industry provisions of the *Labour Relations Act*; that is, they are all applications for certification within the meaning of section 119. None of them, as filed, relate to the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the Act. In two of the applications (3291-86-R and 0250-87-R), the applicant ("Local 27") requested a pre-hearing representation vote. Such votes were directed and taken. In each case, the ballot box was sealed pending resolution of the issues raised in the applications. In that regard, the Board, after hearing the representations of the parties, directed that the three applications be heard together with respect to the issues common to them, namely:

(a) the status of the Labourers' International Union of North America, Local 183 ("Local 183"), the Metropolitan Toronto Apartment Builders Association ("MTABA") and the Form Work Council of Ontario (the "Form Work Council") to intervene and participate in them; and

(b) the bargaining unit description appropriate for the applications.

3. At the hearing, Local 27 conceded that the Form Work Council has status to intervene in Board File No. 3291-86-R. Accordingly, that one is a (partial) displacement application.

4. It was agreed that, for purposes of this stage of the proceedings, Ellis-Don Limited and Ellis-Don Construction Limited would be treated as one employer. We shall refer to them collectively as "Ellis-Don" herein.

5. In these applications, the respondents, Local 183, and the MTABA assert that, contrary to what the Board found in *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305, the collective agreement between Local 183 and the MTABA with respect to the construction of apartment buildings ("MTABA Agreement") covers the employees of the respondents Mollenhauer Limited and Milne & Nicholls Ltd. for whom Local 27 seeks bargaining rights in the applications in Board File Nos. 0250-87-R and 3457-86-R respectively; namely, carpenters and carpenters' apprentices. A collective agreement between Ellis-Don and Local 183 ("the Ellis-Don Agreement") is substantially the same as the MTABA Agreement and the arguments with respect to it are substantially the same as those with respect to the MTABA Agreement. In addition, with respect to the Ellis-Don application only, the respondents and interveners Local 183 and Form Work Council argue that the collective agreement between that company and the Form Work Council, which Local 27 admits covers carpenters and carpenters' apprentices, specifies the appropriate bargaining unit for that application. Local 27 submits that it should be permitted to "carve out" its craft or trade from the bargaining unit established by the Ellis-Don Form Work style agreement.

6. Accordingly, the Board must determine whether carpenters and carpenters' apprentices are covered by the MTABA or Ellis-Don Agreements. To do so, the Board would have to conclude that *Runnymede*, and *Hashman Construction Limited*, [1973] OLRB Rep. April. 205, were wrongly decided. The Board must also determine whether it is appropriate to permit a construction industry trade union to "carve out" its craft from a larger existing bargaining unit insofar as the Form Work Council Agreement is concerned. If the Board concludes that the MTABA and Ellis-Don Agreements do cover carpenters and carpenters' apprentices, the carve out issue arises in that context as well.

7. Local 27 submits that because the question of the applicability of the MTABA Agreement to carpenters and carpenters' apprentices was determined in *Hashman, supra*, and *Runnymede, supra*, the principles of *res judicata* or issue estoppel apply and the Board should not inquire into it further.

8. In *Runnymede Development Corporation Limited, supra*, [1987] OLRB Rep. Oct. 1305, the Board held, at paras 20-24, that:

20. In our view, Article 1.01 of the Housing Bureau Agreement and Article 1.01 of the MTABA agreement, which is incorporated by reference into the Housing Bureau Agreement, describes the intervener's bargaining rights with respect to the respondent. At best, article 1.05 does no more than preserve some (or perhaps all) of the bargaining rights granted to the intervener by the Board's certificate that have not been exercised in the Housing Bureau Agreement. However, by itself, it does nothing to add to those bargaining rights of the intervener which are in issue in this proceeding. We note that insofar as the employers, including the respondent, bound by the Housing Bureau Agreement have explicitly recognized the intervener as the bargaining agent for those employees doing the work covered by either agreement in the County of Simcoe, the scope of the Board's certificate has been exceeded and constitutes a voluntary recognition.

21. In Article 1 of the Housing Bureau Agreement, the employers who are bound by that agreement recognize the intervener as the bargaining agent of their "Construction Employees". However, that very broad term is restrictively defined in terms of the nature of work performed. Pursuant to Article 1.01(a), "Construction Employees" are those "(whose Classifications fall into a category listed in Schedule "A" attached hereto) engaged in the on site construction of all type of low rise housing only and their natural amenities ...". Article 6.01 of Schedule "A" goes on to define "Construction Employees" as being those who perform any or all of a series of listed work or job functions, all of which are, particularly in the industrial, commercial and institutional sector of the construction industry, commonly associated with construction labourers. In addition, unlike the Residential Housing Carpentry Agreement, to which the intervener is also a party and which is a collective agreement referred to in Article 1.03(a)(iii), the Housing Bureau Agreement makes no reference to carpenters or carpenters' apprentices and contains only one wage rate which applies to all of the work performed under it. In our view, the provision in Article 6.1 of Schedule "A" that the job functions listed "shall in no way be limited [thereto], which is intended as a general description only ..." at best means no more than that other work or functions similar in nature to those listed are also covered by the agreement. Consequently, the intervener is not, in our view, the bargaining agent for all "Construction Employees" of employers bound by the Housing Bureau Agreement but only for those employees of such employers in the listed and analogous classifications.

22. Except for bargaining units of or including operating engineers, it is the long-standing practice of the Board to describe bargaining units in the construction industry in terms of trades or crafts (for our purposes these terms are synonymous) rather than in terms of the work performed. This practice recognizes that trade union representation in the construction industry has traditionally been along trade lines and attempts to avoid interfering with established trade union work jurisdictions (see *Robertson-Yates Corporation Limited*, [1979] OLRB Rep. April 344; *Semple-Gooder Roofing Ltd.*, [1983] OLRB Rep. Nov. 1908). Unfortunately, the work jurisdictions of trades do overlap. In addition, as we have already noted, collective agreements in the construction industry often identify the employees in the bargaining unit to which they apply in terms of the work they perform. As a general rule, there is no necessary congruence between the bargaining rights held by a trade union and its work jurisdiction. Consequently, a construction industry trade union does not necessarily have a general absolute right to a particular kind of work, even though that work may be performed by employees whom it represents (which in the construction industry usually means its members) pursuant to the terms of one or more collective agreements. The fact is that, in the construction industry, more than one trade union may have bargaining rights for employees who, though described in terms of different job categories, perform some of the same work. These overlaps give rise to competing claims for work between trade unions; that is, jurisdictional disputes (see for example *Toronto Star Newspaper Limited*, [1979] OLRB Rep. May 451). An application for certification is not the appropriate forum for settling such disputes or for determining the jurisdictional limits of trade unions

(*Industrial Lighting and Contracting Limited*, [1979] OLRB Rep. Oct. 985). Further, because the Board's practice in the construction industry is to describe bargaining units in terms of trade rather than work performed, the mere fact that members of one trade union, pursuant to the terms of a collective agreement, perform work that members of another trade union perform as well (for other employers), does not mean that that collective agreement covers that other trade (see *The Frid Construction Company Limited*, [1975] OLRB Rep. March 146; *Graff Diamond Products* (Board File No. 2817-86-R) decision dated June 29, 1987, unreported).

23. Some of the work covered by the Housing Bureau Agreement is work which can be, and is, performed by either construction labourers, or by carpenters or carpenters' apprentices; that is, it is work over which both trades assert jurisdiction. In other words, some of the work covered by the Housing Bureau Agreement can be done by either members of the United Brotherhood of Carpenters and Joiners of America, (the "Carpenters") or by members of the Labourers' International Union of North (the "Labourers"). It is both "labourers work" and "carpenters work". In such circumstances, the work being performed cannot be determinative of the trade of the person performing it; that is, it is not work belonging to the Labourers just because a labourer is doing it, nor is it work belonging to the Carpenters just because a carpenter or carpenter's apprentice is doing it. An employee is not a construction labourer merely because s/he is doing work that a construction labourer sometimes does if carpenters also perform that work as part of their trade. Consequently, the fact that members of the intervener sometimes perform work (for the respondent) that carpenters also do does not mean that the intervener represents all carpenters employed by the respondent.

24. In *Hashman Construction Limited*, [1973] OLRB Rep. April 205, the Board concluded that the MTABA agreement, as it then was, did not cover carpenters or carpenters' apprentices. There is nothing before the Board in this proceeding that persuades us that we should come to any different conclusion with respect to the present MTABA agreement insofar as its terms and conditions have been incorporated into the Housing Bureau Agreement. Further, we find that for the purposes of this proceeding the Housing Bureau Agreement does not apply to or cover carpenters or carpenters' apprentices in the employ of the respondent. In the result, we find that, in the context of the agreement as a whole, the Housing Bureau Agreement covers only construction labourers, not carpenters, who perform certain construction work on certain non-industrial, commercial and institutional projects, as specified in the agreement, in Board Area 8 and the County of Simcoe (which is part of Board Area 18). Accordingly, the Labourers do not have status to intervene in this application on the basis of the Housing Bureau Agreement.

9. The Board is an administrative tribunal established by the *Labour Relations Act*. As a creature of statute, it has only such powers as have been conferred upon it by or under the *Labour Relations Act*, (or such other legislation as delegates powers to it; see for example, section 24 of *The Occupational Health and Safety Act* R.S.O. 1980 c. 321). The Board has no separate or additional inherent or equitable jurisdiction. However, the structure of the Act is such that the Board nevertheless enjoys a considerable discretion and latitude in bringing its expertise in labour relations to bear on matters before it. In carrying out its functions, the Board can and does apply both legal and labour relations considerations (*Re International Union of Operating Engineers, Local 793 and Trauggott Construction Ltd.*, (1984) 45 O.R. (2d) 127 (Div. Ct.); *Re Shopman's Local Union 743, International Association of Bridge, Structural and Ornamental Ironworkers (AFL, CIO, CLC) and Brayshaws Steel Ltd. et al.*, *Re Brayshaws Steel Ltd. and United Steelworkers of America*, (1972) 26 D.L.R. (3d) 153 (Ont. C.A.)).

10. *Res judicata* is a common law doctrine developed by the courts to preclude parties or their privies from relitigating issues (in other than the appellate process) which have already been resolved by a final judgement of a court of competent jurisdiction. In effect, such a previous decision creates one of two forms of estoppel: cause of action estoppel or issue estoppel. Regardless of its form, the essence of the estoppel created is that once a right, question, or fact distinctly put in issue, is directly determined by a court of competent jurisdiction, it cannot be relitigated in subsequent proceedings between the same parties or their privies. A right, question, or fact specifically determined is to be taken as conclusively established for so long as the judgement of the court

which determined it stands, unless a litigant otherwise bound by the previous determination can establish that there exists a fact or facts which both entirely changes the situation and could not, by exercise of reasonable diligence, been previously ascertained (see *Angle v. Minister of National Revenue*, [1975] S.C.R. 248; *Town of Grandview v. Doering*, (1975) 61 D.L.R. (3d) 455 (S.C.C.)).

11. While it is not obvious that the Board is either bound or entitled to apply the doctrine of *res judicata*, it has applied it, or a principle analogous to it, in order to ensure that, subject to its power to reconsider any decision (under section 106(1) of the Act), its decisions will be final and conclusive of the issues or facts which the Board adjudicates (see *Arnold Markets Limited*, 62 CLLC ¶16,221; *Canadian General Electric Company Limited*, [1978] OLRB Rep. April 384; *K-Mart Canada Limited*, [1981] OLRB Rep. Feb. 185; *Construction Association of Thunder Bay Inc.*, [1987] OLRB July 976 among others).

12. It is also clear, however, that unless a relevant determination can be said to have been made *in rem*, *res judicata*, and any doctrine and principle analogous to it, operates only against the parties to those prior proceedings or those claiming under or through such a party (*Angle v. Minister of National Revenue*, *supra*; *Town of Grandview v. Doering*, *supra*; *Mr. Grocer, Willett Foods Limited*, [1986] OLRB Rep. Oct. 1364; *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501; and see *Valentine Enterprises Contracting Limited*, [1981] OLRB June 807 where it was held that the dismissal of one union's claim that two employers be declared a single employer did not bar another union from seeking the same declaration with respect to the same employers). Generally, only decisions which relate to legal principles of general application are properly considered to have been made *in rem*. Further, it would be inappropriate, in our view, to consider a decision with respect to the applicability of a collective agreement to have been *in rem* if one of the parties to it was not a party to that proceeding.

13. The respondents and the MTABA were not parties to the proceedings in either *Hashman* or *Runnymede*, although the respondent in *Hashman* was a member of the MTABA at the time that matter came before the Board. In the circumstances, we are not prepared to treat either the *Hashman* decision or the *Runnymede* decision as having been made *in rem*, and, in our view, neither *res judicata*, issue estoppel, nor any like principle, can or should preclude them from asking the Board to determine, in this proceeding, whether the MTABA Agreement covers carpenters and carpenters' apprentices. While Local 183 was a party in both *Hashman* and *Runnymede*, it would, in the circumstances, make little sense to bar it from pursuing the issue. Accordingly, we reject Local 27's submissions in that respect.

14. With respect to the status issue, the respondents and interveners asserted that there is a latent or patent ambiguity in the relevant language of the MTABA and Ellis-Don Agreements. They sought to introduce extrinsic evidence with respect thereto, and specifically with respect to past collective agreements, negotiating history and past practice.

15. In determining the status issue, the Board must interpret the provisions of the MTABA and Ellis-Don Agreements in effect at the time these applications were made. It is a well established rule of contract interpretation that where the words of a collective agreement are clear and unambiguous, its meaning must be ascertained only from the words used in it. However, it is permissible to refer to extrinsic evidence where the collective agreement is patently ambiguous, or to discover whether there is any latent ambiguity and, if one is found, to use extrinsic evidence as an aid to interpreting the collective agreement (see *Noranda Metal Industries Ltd., Fergus Division and International Brotherhood of Electrical Workers, Local 2345 et al.* (1984) 44 O.R. (2d) 529 (C.A.); *Re International Union, United Automobile, Aerospace, and Agricultural Implement Workers, Local 1967 and McDonnell Douglas Canada Ltd.* (1984) 47 O.R. (2d) 78 (Div. Ct.); *The*

Brant County Board of Education, [1984] OLRB Rep. Oct. 1349). In the result, the Board finds it appropriate to consider the extrinsic evidence adduced at the hearing.

16. The MTABA Agreement effective from May 6, 1985 to April 30, 1987 was in effect at the time these applications were made. It was the 8th such agreement between Local 183 and the MTABA. The respondents Mollenhauer Limited and Milne & Nicholls Ltd. were members of the MTABA and bound by that MTABA Agreement at the time. Ellis-Don was not. The preamble of the MTABA Agreement provides, in part, that:

WHEREAS the Association acting on behalf of the Companies whose names appear on the attached Schedule of Employers and the Union wish to make a common Collective Agreement with respect to certain employees of the Employers engaged in construction as defined in Article 1 of this Collective Agreement and to provide for and ensure uniform interpretation and application in the administration of the Collective Bargaining Agreement;

The MTABA Agreement also provides:

ARTICLE 1 - RECOGNITION - CO-OPERATION - CONTRACTING OUT

- 1.01 Each of the Employers recognize the Union as the Collective Bargaining Agent for *all of its own construction employees, (whose classifications fall into a category listed on Schedule "A" attached hereto)*, engaged in the on-site construction of all types of apartment buildings only and their natural amenities, and without restricting the generality of the foregoing, and for the purposes of clarification, it is agreed that the following building types shall be deemed to be an apartment building for the purposes of this Agreement:

• • •

- 1.02 In the event an Employer covered by this Agreement engaged in the construction of an apartment building as herein defined, by means of a corporation, individual, firm, syndicate or association or any combination thereof, and where the Employer is the builder, it shall be deemed that the Corporation, individual, firm, syndicate or association or combination thereof, is bound by the Agreement for the purposes of such construction work.

Each of the Employers agree that when engaged in the on-site construction of "low-rise housing" they shall abide by the terms and conditions of the Collective Agreement between the Toronto Housing Labour Bureau and the Labourers' International Union of North America, Local 183.

The term "low-rise housing" whenever used in this Collective Agreement shall be given the same meaning as that term is given in the Collective Agreement between the Toronto Housing Labour Bureau and the Labourers' International Union of North America, Local 183.

- 1.03 Should an Employer sublet the following work:

(i) General Construction Labour;

(ii) Concrete Superstructure;

- forming

- reinforcing steel placing

- concrete placing and finishing

(iii) Concrete and Drains

- (iv) Paving and Parking Lot Construction
- (v) Hard Landscaping:

“hard landscaping which shall mean

poured in place curbs, planter boxes, sidewalks, and pathways and

the installation of pavers including flag stone and interlocking stone.”
- (vi) Sheet Piling, Shoring and Lagging (Labour)
- (vii) Buried Internal Site Services installed by, or let by, the Employer.
- (viii) on-site manufacture and erection of structural precast concrete balcony panels and concrete stairs and other precast not normally erected by a precast specialty contractor in the sub-structure and super-structure and excluding landscaping components,

then such work shall be sublet to companies in contractual relations with the Union.

- 1.04 The terms and conditions of this Agreement are recognized only in Geographic Area No. 8 established and used by the Ontario Labour Relations Board in matters of certification:

The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the town of Milton within the geographic Township of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Simcoe.

- 1.05 The Employer recognizes that the Union represents and bargains for its members in various other sectors of the construction industry *not covered by this Agreement, such as concrete forming*, sewer and water main construction, road building, etc. Therefore, the employers hereby agree to recognize the Union as the bargaining agent in such sectors of the construction industry as it may from time to time become engaged in for its labourers and will meet with the Union in such events to agree on the appropriate applicable collective agreement for such work.

ARTICLE 7 - SCHEDULE “A”

- 7.01 Attached hereto as Schedule “A” to this Agreement are schedules of:

- (i) Hours of Work & Overtime
- (ii) Wages
- (iii) Payment of Wages
- (iv) Vacation Pay & Statutory Holiday Pay
- (v) Premium Classifications
- (vi) Classifications
- (vii) Working Dues
- (viii) Pension Plan
- (ix) Welfare
- (x) Travel Allowance

and they are hereby made part of this Agreement.

SCHEDULE ‘A’

WAGES

- A.2.1 The basic hourly rate of pay shall be, effective:

May 6, 1985 - \$13.11

May 1, 1986 - \$13.51

PREMIUM CLASSIFICATIONS

- A.5.1 It is agreed that employees hired at the start of their employment on a full-time basis into the following classifications:

Pipe Layers
Concrete Finishers
Form Erectors and Setters

shall be paid .30 (thirty cents) more than the basic Labourer's rate. It is also agreed that if a man is re-classified into one of the above classifications on a full-time basis he shall be paid the appropriate rate.

CLASSIFICATIONS

- A.6.1 Employees covered by this Agreement shall be *all Construction Labourers employed in accordance with Article 1, 1.01 hereof, save and except employees employed as Operating Engineers, non-working Foremen, Watchmen, and Operators of Personnel hoists.*

For the purposes of this Agreement, *Construction Labourers shall be those employees engaged in construction work on residential construction projects being constructed by the Employer, and as defined in Article 1, 1.01 hereof*, up to the takeover of the said construction project or part thereof by Maintenance and Management employees of the Employer, or Maintenance and Management employees of some other Employer.

For the purposes of clarification, Construction Labourers shall be generally those employees engaged in part, or all, of the following work or job functions, but shall in no way be limited to the following which is intended as a general description only:

Cleaning (all types)
Material Handlers and Stockpilers
Welders' Helpers
Landscapers
Salamander Heatermen
Flagmen
Concrete Workers (except Concrete Finishers)
Sheathing and Shoring Men
Concrete Curers, Oilers and Painters,
Grademen, Timbermen, Temporary Fencing, Hoarding and Guard Rail Installers,
Handymen, Maintenance Men, Storemen, Gardeners
Pipe Insulators
Farm Tractor Drivers

WAGE SCHEDULE

APARTMENT CONSTRUCTION

LOCAL 183 LABOURER

	May 6, 1985	May 1, 1986
Basic Hourly Rate (Gross Wage)	\$13.11	\$13.51
Vacation & Statutory Holiday Pay (at 10%)	\$ 1.31	\$ 1.35
Welfare Fund	\$ 1.00	\$ 1.10
Pension Fund	\$.40	\$.50
Training Fund	\$.05	\$.05
Package	\$15.87	\$16.51
Industry Fund	\$.15	\$.15
Cost to Employer	\$16.02	\$16.66

[emphasis added]

17. The respondents Mollenhauer and Milne & Nicholls, and the interveners assert that the MTABA Agreement is an all employee agreement, subject only to the specific exclusions therein. Accordingly, they argue, it covers the carpenters and carpenters' apprentices who are the subject of the applications in Board File Nos. 3457-86-R and 0250-87-R. In that respect, Local 183 found itself having to make the rather unusual assertion that, in the residential sector of the construction industry in Board Area 8, and only there, "construction labourers" means "all direct employees" of MTABA builders, except employees of a company to whom work had been sub-contracted by a MTABA builder.

18. We do not agree. In our view, there is no patent ambiguity in the relevant provisions of the MTABA Agreement. Nor does the evidence disclose any latent ambiguity. Indeed, the extrinsic evidence merely confirms our conclusion that carpenters and carpenters' apprentices are not covered by the MTABA agreement.

19. Article 1.01 of the MTABA Agreement begins with a recognition by the employers bound by it that Local 183 is the bargaining agent for all their "own construction employees". However, it then proceeds to restrict that apparently very broad recognition to those construction employees "whose classifications fall into a category listed on Schedule "A" to the agreement who are engaged in the on-site construction of apartment buildings as specified. Article A.5.1 of Schedule "A" lists three such classifications which receive a wage premium of .30 cents "more than the basic *labourers* rate" (emphasis added): pipe layers, concrete finishers, form erectors and setters (which latter classification is interesting since Article 1.05 of the MTABA Agreement specifically excludes concrete forming work from the agreement). This premium added to the single wage rate established by the agreement does no more than recognize that some labourers' work is more sophisticated, and valued more highly, than other labourers' work. Article A.6.1 of Schedule "A" specifies that persons employed as operating engineers, non-working foremen, watchmen and personnel hoist operators are excluded from the bargaining unit and that the MTABA Agreement covers only *construction labourers*. In our view, these exclusions do not suggest that the MTABA Agreement covers employees in all other trades. They do no more than underline the fact that persons employed in one of the categories listed are not covered by the agreement. Indeed, they are largely redundant. (Indeed, the operating engineers and operators of personnel hoists exclusions have been deleted from the 1987-89 MTABA Agreement). The terms "carpenters" and "carpenters' apprentice", both of which are terms well established and known in the construction industry, are not used *anywhere* in the MTABA Agreement. Nor is any term which is synonymous with, or specifically suggestive of, carpenters and carpenters' apprentice, or either of them, used anywhere

in the agreement. Nor are any other trades, such as plumbers, steamfitters, electricians, (or their apprentices) listed, as one might expect they would be if the MTABA Agreement was truly intended to be an all employee agreement. In that regard, we note that “concrete painters” are included. If the agreement was intended to cover all painters why not simply put “painters” rather than specifying “concrete painters”? We also note, as did the Board in *Runnymede*, that Local 183 is familiar with the use of the terms carpenters and carpenters’ apprentice as indicated by their presence in the Residential Housing Carpentry Agreement to which it is a party. The parties to the MTABA Agreement could have and should have used the words carpenters and carpenters’ apprentice (or words like them) if they truly intended that such employees be covered by the MTABA Agreement.

20. Insofar as the classifications listed in the MTABA Agreement are concerned, they are claimed by the Labourers International Union of North America, of which Local 183 is a local union, as part of its work jurisdiction in every sector, including the industrial, commercial and institutional (“ICI”) sector, of the construction industry in which they or analogous classifications exist. In the ICI sector, the United Brotherhood of Carpenters and Joiners of America also claims hoarding, fencing and guard rail work and such work is therefore within the overlap between the claimed work jurisdictions of the two unions. Subject to that clarification, we agree with, and find applicable to these proceedings, the observations and findings of the Board in paragraphs 20-24 of *Runnymede* (see paragraph 8 above). In paragraph 23 of *Runnymede*, the Board pointed out that the mere fact that labourers represented by Local 183 sometimes perform work for members of the MTABA which is also done by carpenters, and is claimed by Local 27, does not mean that Local 183 represents all carpenters employed by members of the MTABA. We wish to observe that this overlap in trade jurisdiction can make the Board’s task of determining which employees are in either a “labourers” or “carpenters” bargaining unit on the date of application more difficult since, in applications such as these, the Board will have to determine whether a person performing work within the overlap on the date of application was a carpenter or a labourer (see, *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41; *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220).

21. In the result, we find, as did the Board in *Runnymede*, *supra* and *Hashman*, *supra*, that the MTABA Agreement does not, on its face, cover carpenters or carpenters’ apprentices employed by members of the MTABA.

22. Nor, in our view, is there any latent ambiguity in the MTABA Agreement. The history of the MTABA Agreement has its roots in an agreement between the MTABA and the Toronto Building and Construction Trades Council (Residential Division) (it and its successors hereinafter referred to as the “Building Trades Council”), entered into on September 20, 1969. This agreement has been characterized as being a “peace treaty” which arose out of the turmoil in what is now the residential sector of the construction industry in Board Area 8. In its preamble, there is an expression of a mutual desire to “promote and encourage the residential construction industry and the productivity of the industry and insure a standard of safety and efficiency for the protection of the public and for those persons engaged in the residential construction industry, by the establishment of rules and regulations to govern employment, wage scales and working conditions and to eliminate unfair and destructive practices and to promote the amicable settlement of difference which may arise between the members of the respective organizations who are bound by this agreement and also to maintain industrial peace”. Article 3.02 of that agreement provided that:

3.02 At such time as 80 per cent of those builders named in Schedule “C” hereto become members of this Association and bound by this agreement, the Association shall thereupon recognize Labourers Local Union 183, as the exclusive bargaining agent for their employees, save and except foremen and persons above the rank of foreman,

and they shall immediately bargain in good faith and make every reasonable effort to make a collective agreement.

[emphasis added]

However, an addendum to that agreement, also dated September 20, 1969, provides (in part) that:

3. In connection with Article 3.02 of the said agreement the fourth line thereof is amended as follows:

“.....Union 183, as the exclusive bargaining agent *for their labourers*, save and”

IT IS UNDERSTOOD AND AGREED that labourers shall be permitted to continue to perform such duties as are normally performed by them in the residential construction industry.

[emphasis added]

We cannot accept that, as was suggested by the respondents and interveners, the substitution of the word “labourers” for the word “employees” meant nothing. This addendum, together with the evidence before the Board, establishes that the change was made to placate other construction trade unions which were concerned that Local 183 was invading their trade jurisdictions. It also establishes that it was intended that Local 183 would represent labourers doing what they had traditionally done, including some small scale concrete forming work, in the residential sector of the construction industry.

23. Article 3.02, as amended, of this first agreement was not carried forward in subsequent collective agreements between the MTABA and the Building Trades Council, the last of which expired on April 30, 1983. The general structure of the agreements between the MTABA and the Building Trades Council suggests that they were intended to provide a mechanism by which various trade unions, including Local 183, could obtain bargaining rights for those employees of members of the MTABA who were members of their trade, and not as a means by which Local 183 could obtain bargaining rights for all employees of such companies regardless of their trade. For example, in a memorandum dated July 5, 1973, the MTABA and the Building Trades Council agreed that:

MEMORANDUM OF AGREEMENT

B E T W E E N:

METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION

- and -

THE TORONTO BUILDING AND CONSTRUCTION TRADES COUNCIL

The parties hereto are parties to an Agreement between them dated September 20, 1969. With reference to Article 1.03 of the said Agreement, the parties have perused the Agreement between the Carpenters District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190, and certain trim contractors, the names of which appear on Schedule A attached to this Agreement, in the trim carpentry trade. The parties hereto are satisfied in all the circumstances that the terms and conditions of the said Article 1.03 have been met with respect to this Agreement, and that a sufficient number of contractors in the trade have signed an Agreement with the said Local 1190 with respect to trim carpentry work (excluding concrete forming) in the residential sector of the construction industry which trim carpentry work is more particularly described as follows:-

A. (a) For the installation of wood doors or wood core doors, (wood frames where

applicable), and traditional wood door amenities including jambs, casings, stops, and traditional wood door hardware amenities including hinges, locks, closers, pulls, pushes and kick plates.

- (b) For the installation of wood sash, (wood frames where applicable), and traditional wood sash amenities including mullions, muntins, casings, stops, sills, stools, aprons and traditional wood sash hardware amenities including pulls, lifts, closers, stays and spiral balances.
 - (c) For the installation of wood baseboards, quarter-rounds, shoe strips, shelf supports, shelves, and traditional hardware amenities including closet rods, rail and roller sets, and door bumpers.
- B. It is agreed that should the Carpentry Contractor, as part of his Contract, in addition to the Trim Carpentry items (defined in A), undertake for the installation of miscellaneous items such as wood stairs, floor-to-ceiling closets doors, kitchen cabinets, vanities, hardwood floorings, lockers; and/or Site Service preparations including stake-outs, batterboards, fences, hoardings, field offices, temporary enclosures, temporary protection; and/or Rough Carpentry preparations including strappings, grounds, bucks, cant strips, and etc., only Carpenters affiliated with Local 1190 may be employed.
 - C. It is agreed that should the Carpentry Contractor be awarded, as part of his Contract, in addition to Trim Carpentry defined in A, any of the items outlined in B, such award is not intended to establish a jurisdictional precedence for any other future project of a Member.
 - D. It is agreed, notwithstanding any of the preceding, the installation of Forming by Carpenters affiliated with Local 1190 is specifically excluded from this Agreement.

The parties hereto therefore agree and acknowledge that effective as of the date hereof that trim carpentry as defined above shall be designed as a trade which falls within the terms and conditions of Schedule "B" of the Agreement between the parties hereof, and Schedule "B" shall be accordingly amended to include the said Local 1190 with respect to this trade, which shall be defined as those employees engaged in trim carpentry work (excluding concrete forming) in the residential sector of the construction industry which trim carpentry work is more particularly described above.

DATED at Toronto this 5th day of July, 1973.

In our view, this suggests a recognition that both carpenters and non-carpenters work covered by the MTABA Agreement, but does not necessarily mean that carpenters were covered by it. Indeed, to the extent that it suggests anything, it suggests that the work specified in "B" was done and claimed by both carpenters and labourers, and that carpenters were not covered by the MTABA Agreement.

24. The MTABA and Local 183 picked up the essence and intent of the amended Article 3.02 of the first Building Trades Council agreement in the first collective agreement between them, which agreement was effective from May 1, 1970 to May 1, 1973. There is no suggestion in any of the evidence, either that any of the MTABA members at the time employed, or expected to employ, any trade other than that of construction labourer, or that the MTABA agreement was intended to cover any employees other than construction labourers performing labourers' work.

25. The Board's decision in *Hashman* issued just prior to the expiry of the first MTABA Agreement. There were no changes in any of the subsequent MTABA Agreements in any of the provisions which are relevant to our considerations in these proceedings as a result of the Board's determination in *Hashman* that the first MTABA Agreement did not cover carpenters or carpenters' apprentices. It is reasonable to expect that such changes would have been made had Local 183

and the MTABA intended that the agreement cover such employees. We do not accept the assertion of the MTABA and Local 183 that they were not aware of the *Hashman* decision prior to the proceedings in *Runnymede*. First, Local 183 was a party to the *Hashman* proceeding. Second, the *Hashman* decision was published in the Board's monthly reports. Third, Hashman Construction, the respondent in *Hashman*, was a member of the MTABA at the time and the MTABA either did know of must be taken to have known of the decision. Yet there were no substantive changes to any of the relevant provisions (which are set out in paragraph 16 above) in any of the MTABA agreements entered into subsequent to the Board's decision in *Hashman*, including the one which was in effect at the time these applications were made.

26. Furthermore, Local 183's request for the appointment of a conciliation officer with respect to the MTABA agreement in 1973, 1975, 1979, 1983, 1985 and 1987, all describe, in paragraph 1(d) of the request, the "specific nature of the work performed by employees affected by this application" as being "labouring" work "in connection with" residential or in some instances, more specifically, apartment construction.

27. In addition, in the negotiations leading to the 1983-85 MTABA Agreement and to the one presently in effect (that is, in effect from May 1, 1987 to April 30, 1989), Local 183 sought, unsuccessfully, to have the word "carpenter" added after "handyman" in Article 8.6.1 of Schedule A. Why would that be necessary (or, from the MTABA's view, objectionable) if the trade or work of carpenters or carpenters' was already covered by the MTABA Agreement? No satisfactory explanation was offered in that respect.

28. It is also instructive, and consistent with our analysis, that Local 183 wrote a letter dated July 14, 1975, to the MTABA which contains the following paragraph:

... let me assure you that our Local Union is only interested in representing the Builders' labourers on said projects, and in protecting our established jurisdiction in the Concrete Forming House Basement area.

[emphasis added]

This was written with respect to the collective agreement between the MTABA and Local 183 with respect to residential construction other than apartment buildings and which, pursuant to Article 1.01 covered all of the MTABA members "own construction employees ... whose classification falls into a category listed in Schedule A", which classifications are identical to those in what was then Article 8 and is now Article A.6.1 of Schedule A to the MTABA Agreement. While the non-apartment building residential construction agreement does not contain any of the premium classifications, including "form erectors and setters", it is evident that insofar as the classifications listed in Article A.6.1 of Schedule A are concerned, Local 183 and the MTABA both understood the agreement to apply to construction labourers only. Accordingly, even in the minds of Local 183 and the MTABA, none of the employees in those classifications are anything other than labourers.

29. There is evidence before the Board of what work is captured by the classifications in the MTABA Agreement. There is no suggestion in any of the evidence that any of the work done under the MTABA Agreement is work which would otherwise be identified exclusively with the carpenters trade. On the contrary, it is evident that the labourers trade and the carpenters trade both assert that all of the work is within their jurisdiction.

30. With respect to Local 183's assertion that the term "construction labourers" has the special and expanded meaning of "all employees" in the residential sector of the construction industry in Board Area 8 (see paragraph 17 above), we observe that the Board in *Runnymede* found that not to be so in respect of the non-apartment portion of the residential sector when it

decided that the Housing Bureau Agreement (between Local 183 and the Toronto Housing Labour Bureau), which agreement is the successor agreement to the one referred to in the July 14, 1975 letter quoted in paragraph 28 above, and which has been characterized as being the "low rise MTABA agreement", does not cover carpenters or carpenters' apprentices. That decision has not been challenged either in these proceedings or elsewhere.

31. Finally, we come to the collective agreement between the Ontario Form Work Association and the Form Work Council of Ontario (the "Form Work Agreement"). Local 183 is a constituent trade union of the Form Work Council. The history of the manner in which it became a bargaining agent for employees engaged in concrete forming construction in Ontario is well known and has been reviewed in previous decisions (see, for example, *Peniche Construction Forming*, [1974] OLRB Rep. April 208; *Urban Consolidated Construction Ltd.*, [1977] OLRB Rep. Feb. 41; *West York Construction Ltd.*, [1983] OLRB Rep. Dec. 2132). Although the Form Work Agreement contains no "carpenter" or "carpenters' apprentice" classification, it is common ground in these proceedings that it does cover such employees. The Form Work Agreement covers employees classified as "Form Builders-Setters" and "Form Helpers". It is apparent that carpenters and carpenters' apprentices covered by that agreement must fall within one of those classifications. The MTABA Agreement also covers employees classified as "Form erectors and Setters", and was used to cover small scale concrete forming construction done by direct employees of MTABA members, notwithstanding that Article 1.05 excludes concrete forming work from coverage by it. Indeed, Local 183's evidence suggests that while it was anticipated that "flat" concrete forming work (e.g., sidewalks, curbs) would be covered by the MTABA Agreement but that concrete forming of superstructures would not be. Does this mean that the MTABA also covers carpenters and carpenters' apprentices?

32. We think not. First, the Form Work Agreement is of broader application than the MTABA Agreement, which applies to but one part of the residential sector of the construction industry in Board Area 8 and part of Board Area 18. It also contains a wage structure which more clearly differentiates between the different classifications of jobs involved in concrete form work. It may be that both carpenters and labourers are able to build, erect, and set concrete forms. It may also be, and there is no evidence before the Board on this point, that "building" a form is the same as "erecting" one. We note that the term "form erectors and setters" is used in the agreement between the Heavy Construction Association of Toronto and Local 183 which covers "construction labourers" in the heavy engineering sector of the construction industry. Other than for Mr. Minsky's assertion, in argument, that there is an understanding in the industry that this heavy engineering agreement covers an "all employee" bargaining unit which includes them, there is no suggestion in anything before the Board that it covers carpenters. On its face, it does not. However, even if it does it would be either as form "builders" or form "setters". The Board has previously found that form setters may be, but are not necessarily, carpenters (and vice versa) (see *Gisar Contracting Limited*, [1985] OLRB April 528). The same can be said for form builders. (Similarly, sheeting [sic] and shoring men, and timbermen in (trenches) are *construction labourers* covered by the heavy engineering agreement). Further, while the heavy engineering agreement does include a wage rate for "form builder, fabricator and erector ..." as distinct from "form setters" (who receive different wage rate), it also has appended to it the following letter of understanding:

LETTER TO: The Heavy Construction Association of Toronto

FROM: Labourers' International Union of North America, Local 183

Re: Collective Agreement,
May 1st, 1986

Further to the signing of the collective agreement between us, this letter will serve to confirm certain understandings which were reached in connection with the classifications of Form Builder, Fabricator and Erector. It is agreed and understood that the said classification does not apply to those employees engaged in the building, fabrication and erection of forms and in the employ of an employer who is in contractual relationship with the United Brotherhood of Carpenters and Joiners of America.

Dated at Toronto, this 6 day of Nov, 1986.

Signed on behalf of The
 Heavy Construction
Association of Toronto

Signed on behalf
 of the Labourers'
 International
 Union of North
America, Local 183

In our view, we cannot conclude that a "form builder-setter" is the same as a "form erector and setter", or that either of them are, in any event, carpenters. Even if we could so conclude, the fact that a classification under one collective agreement includes (in this case) carpenters and their apprentices does not mean that the same or equivalent classification in another collective agreement also does so. Accordingly, the fact that "form erectors and setters" are covered by the MTABA agreement does not mean that carpenters employed by members of the MTABA are necessarily covered by the MTABA Agreement. In our view, neither the words of that agreement, nor the extrinsic evidence support such a conclusion.

33. In the result, we find that the MTABA Agreement does not cover carpenters or carpenters' apprentices. Consequently, neither Local 183 nor the MTABA has status to intervene in the applications in Board File Nos. 0250-87-R or 3457-86-R on the basis thereof.

34. The Ellis-Don Agreement expressly provides that the direct employees of Ellis-Don engaged in concrete forming construction are covered by the collective agreement between the company and the Form Work Council of Ontario. Other than that, the Ellis-Don Agreement is identical in all material respects to the MTABA agreement. Further, on the evidence before the Board, we are satisfied that the aforesaid analysis with respect to the MTABA Agreement is equally applicable to it and the result is the same. The words of this MTABA style agreement between Ellis-Don and Local 183 do not support the opinion of the witnesses who testified on behalf of Ellis-Don to the effect that all of its employees were covered by it. Nor is there any other cogent evidence which does so. In that regard, the evidence reveals that there was little real discussion between the parties with respect to the classifications in the agreement, that the classifications were of some significance to Local 183 but of no real importance to Ellis-Don, and that the Form Work Agreement which Ellis-Don entered into with the Form Work Council, rather than the Ellis-Don Agreement (with Local 183), was intended to cover all direct employees of Ellis-Don doing concrete form work. There was no explanation for the failure to include the terms "carpenters" or "carpenters' apprentice" (or any other trade designation), and no suggestion that Ellis-Don directly employed any trade other than the construction labourer at the time it and Local 183 entered into their agreement or that the MTABA style agreement was intended to cover anyone other than construction labourers. Also, as in the case of the MTABA Agreement, Local 183's request for the appointment of a conciliation officer in respect of its MTABA style agreement with Ellis-Don identified the nature of the work performed by employees affected by the application as all *labouring* work in connection with residential construction. Finally, it is clear that Ellis-Don, the Form Work Council and Local 183 understood that the Ellis-Don Agreement does not cover all direct employees doing concrete forming work. Indeed, the Ellis-Don Agreement itself and

Local 183's letter to the Board dated April 30, 1987 in this matter confirm that the employees covered by Local 183's Form Work Council style agreement with Ellis-Don are not covered by the Ellis-Don (MTABA style) Agreement. Nor does the evidence support the suggestion that any of Ellis-Don's concrete forming construction work has been done under the Ellis-Don Agreement rather than under its Form Work Council style agreement.

35. We come then to the question of whether Local 27 should be permitted to "carve out" its craft or trade; that is, carpenters and carpenters' apprentices, from the broader bargaining unit defined by the Form Work style agreement between Ellis-Don and the Form Work Council. Because of our conclusions with respect to the scope of the MTABA Agreement, that issue does not arise in the other two applications or in respect of the Ellis-Don Agreement.

36. As far as we are aware, the Board has never been faced with a carve out issue in circumstances precisely like those before us. Here, Local 27 seeks, in an application made pursuant to section 144(3) of the Act, to be certified as the bargaining agent for its standard non-ICI craft unit; that is, the carpenters and carpenters' apprentices employed by Ellis-Don in all sectors of the construction industry, except the ICI, in Board Area 8. Carpenters and carpenters' apprentices employed by Ellis-Don who are engaged in concrete forming construction in the residential sector of the construction industry in Board Area 8 and the County of Simcoe are already represented by the Form Work Council under a Form Work style collective agreement. Accordingly, this is a partial displacement application. Neither Local 183 nor the Form Work Council are designated employee bargaining agencies (or affiliated bargaining agents of one) with respect to employees engaged in concrete forming construction. Indeed, there is no designation order directed specifically at such employees. The collective agreement between The Ontario Form Work Association and The Form Work Council of Ontario, by virtue of the exclusions from the designation issued by the Minister of September 30, 1983 where the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council (the employee bargaining agency of which Local 183 is an affiliated bargaining agent), is a section 144(5) type of bargaining unit (*Matterhorn Construction (Hamilton) Limited*, [1981] OLRB Rep. Sept. 1276). The Form Work style agreement between Ellis-Don and the Form Work Council is somewhat different in that, unlike the Form Work Agreement itself, it is limited in its scope to the residential sector of the construction industry in Board Area 8 and the County of Simcoe (which is part of Board Area 18) and, accordingly, it does not come within the terms of the exclusion to the designation order.

37. Sections 6, 119(1) and 144 of the *Labour Relations Act* provide that:

6.-(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

(2) Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

(3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established

trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

(4) A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but, the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of such professional engineers wish to be included in such bargaining unit.

(5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.

• • •

119.-(1) Where a trade union applies for certification as bargaining agent of the employees of an employer, the Board shall determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area and it shall not confine the unit to a particular project.

(2) In determining whether a trade union to which subsection (1) applies has met the requirements of subsection 7(2), the Board need not have regard to any increase in the number of employees in the bargaining unit after the application was made.

• • •

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

(2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(3) Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

(4) A voluntary recognition agreement in so far as it relates to the industrial, commercial and institutional sector of the construction industry shall be between an employer on the one hand and either,

- (a) an employee bargaining agency;

- (b) one or more affiliated bargaining agents represented by an employee bargaining agency; or
- (c) a council of trade unions on behalf of one or more affiliated bargaining agents affiliated with the council of trade unions,

on the other hand, and shall be deemed to be on behalf of all the affiliated bargaining agents of the employee bargaining agency and the defined bargaining unit in the agreement shall include those employees who would be bound by a provincial agreement.

(5) Notwithstanding subsections (1) and (4), a trade union that is not represented by a designated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf.

38. We also note that from 1970 to 1975 what is now section 6(3) of the Act had the following words added to it:

...or where the group of employees is exercising a combination of technical skills or is required to perform the skills in whole or in part of more than one craft as part of a work crew or team, the other members of which are also required to perform in similar fashion.

39. In applications for certification which do not relate to the construction industry where there is an existing bargaining unit represented by a trade union, the Board's general practice is to view the existing bargaining unit as being *prima facie* appropriate for the application. Notwithstanding this strong presumption in favour of an existing bargaining unit, the Board will find another bargaining unit appropriate for an application if it is satisfied there are compelling reasons to do so (see, for example, *Canadian Red Cross Society Blood Transfusion Service*, [1978] OLRB Rep. May 408; *Milltronics Ltd.*, [1980] OLRB Rep. Jan. 56; *Ontario Hydro*, [1980] OLRB Rep. June 882; *W.M.I. Waste Management of Canada Inc.*, [1981] OLRB Rep. March 409; *Scarborough Public Utilities Commission*, [1982] OLRB Rep. June 929; *Bestview Holdings Ltd.*, [1983] OLRB Rep. Feb. 185). In addition, section 6(3) gives the Board a discretion to carve out a craft unit from an existing industrial one. In determining how to exercise its discretion in such circumstances, the Board will consider the relevant circumstances, including the general nature of, and organizational practices in, the industry concerned, the history of collective bargaining in the industry and with the employer concerned, the organizational practices of the incumbent trade union, the community of interest between the craft employees in question and the rest of the existing bargaining unit employees, and the history of representation of the craft employees by the incumbent trade union. As a practical matter, the Board has generally refused to sever craft units from industrial units in circumstances where the parties do not agree that it is appropriate to do so and there is a history of proper representation of the craft group by the incumbent.

40. Historically, the Board has taken a different approach to craft severance in applications for certification in the construction industry. The Board has long recognized that the nature of the employment relationship in the construction industry is different from that in other industries (see for example, J. A. Willes, *The Craft Bargaining Unit*, Industrial Relations Centre, Queen's University, 1970, generally and specifically at p. 30; George W. Adams, Q.C., *Canadian Labour Law*, (Canada Law Book Inc., Aurora, 1985) at pp. 863-893). The nature of the employment relationship in the construction industry has been partly responsible for the development of crafts or trades, and for the development of trade unions along trade or craft lines. Indeed, there are many employers in the construction industry which arrange their affairs in this manner as well; that is, they employ persons in one or more in specific trades to do the work of the trade to which they "belong" as required in the employer's business. Parenthetically, we observe that the term "craft" generally refers to a particular type of skilled or semi-skilled work (e.g. carpentry). The term "trade" is generally used to refer to an occupation or vocation (e.g. carpenter). For labour relation

purposes, these terms have come to be used virtually interchangeably and, for our purposes, we consider them to be synonymous.

41. As a result of the nature of, and history of trade union organization in, the construction industry, the Board has generally attached great weight to trade considerations and, in the absence of any existing bargaining unit, certification in the construction industry has traditionally been on the basis of trade. Even where a non-craft trade union makes an application for certification in the construction industry (and there is no existing unit), the Board's practice is to describe the bargaining unit in terms of the trades at work on the date of application (see *Duron Ontario Limited*, [1976] OLRB Rep. Nov. 734; *A. N. Shaw Restoration Ltd.*, [1981] OLRB Rep. Mar. 241). Indeed, the *Labour Relations Act* recognizes craft interests both generally (section 6(3) and 91), and specifically in the construction industry in the province-wide bargaining scheme (sections 137 to 151) which is largely premised on the primacy organization by trade. Prior to provincial bargaining and the subsequent enactment of section 144, the Board's approach to applications for certification in the construction industry was to determine the bargaining unit pursuant to section 6(3) where the applicant was a craft trade union, and section 6(1) where the applicant was a non-craft trade union. In displacement applications, however, the appropriate bargaining unit was always determined under section 6(1) which allowed non-craft trade unions to displace craft unions as bargaining agents for craft bargaining units. We note that in *Duron Ottawa Ltd.*, [1983] OLRB Rep. Oct. 1639 the Board commented that:

3. In ordering the vote for such a bargaining unit, the Board has departed from a long established policy of this Board in displacement situations. That policy is perhaps best enunciated in the case of *Duron Ontario Limited*, [1976] OLRB Rep. Nov. 737 where, simply put, even in cases involving the construction industry and notwithstanding the Board's recognition of the craft structure of the construction industry, the Board in displacement cases has always determined the bargaining unit as a displacement unit under section 6(1) of the Act, and the incumbent was required in such displacement applications to take all the employees in the existing bargaining unit.

To the extent that this comment suggests that it had been the Board's practice, before the advent of provincial bargaining, to not allow a craft construction union to carve out its trade from an existing unit, it is inconsistent with the authorities, including the *Duron Ontario Limited* decision to which it refers (see, for example, *Kent Tile & Marble Co. Ltd.*, 61 CLLC ¶16,204; *Ellwood Robinson Limited*, [1967] OLRB June 261; *Pre-Con Murray Limited*, [1967] OLRB Rep. Oct. 684; *J. D. Coad Construction Company Limited*, [1969] OLRB Sept. 755; *Nadeco Limited*, [1970] OLRB Rep. April 41; *Canwall Contractors Ltd.*, [1975] OLRB Rep. July 532; *Duron Ontario Limited*, *supra*).

42. The Board's general discretion, under section 6(1) of the Act, to determine what bargaining unit is appropriate in applications for certification in the construction industry, already somewhat limited by section 6(3) which deems craft units to be appropriate, was further limited by the enactment, in May 1980, of section 144.

43. Section 144 covers all applications for certification in the construction industry (see *Clarence H. Graham Construction Ltd.*, [1981] OLRB Rep. Sept. 1195; *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction Ltd.*, [1983] OLRB Rep. Mar. 407 and July 1104). Under the province-wide bargaining provisions of the Act, some construction industry trade unions are designated to represent certain specific trade or crafts in bargaining in the ICI sector of the construction industry. A trade union represented by a designated employee bargaining agency may, at its option, apply for certification under either section 144(1) or (3), or enter into voluntary recognition agreements under section 144(4). Construction trade unions which are not represented by a designated employee bargaining agency, and are therefore not covered by sections 144(1)-(4)

of the Act, such as the Christian Labour Association of Canada, can apply for certification or enter into voluntary recognition agreements in the construction industry under section 144(5).

44. The designation orders issued pursuant to section 139(1) of the Act describe the provincial units of employees contemplated by the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of trades and designate, for each such bargaining unit, an employer and employee bargaining agency. In effect, such orders designate the trade(s) which “belongs” to each employee bargaining agency and its affiliated bargaining agents. Employee bargaining agencies, and their affiliated bargaining agents, can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (see *Ninco Construction Ltd.*, *supra*; *Manacon Construction*, *supra*; *Superior Plumbing and Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228). Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe an ICI sector bargaining unit in a manner which is inconsistent with the relevant designation order. To accommodate this designation system, and recognizing that trade union representation in the construction industry has historically been along trade or craft lines, the Board’s general practice, in applications under section 144(1), is to describe bargaining units in terms of the relevant trade and using the words of the relevant designation order.

45. Consequently, while section 144 does fetter the Board’s discretion under section 6(1), it has preserved and codified the Board’s historical willingness (see paragraph 40 and 41 above) to carve out a craft unit from an existing construction industry bargaining unit. Indeed, the Board has viewed such carve outs as being mandatory in section 144(1) applications (see for example *Crown Electric*, [1982] OLRB Rep. May 660 *Duron Ottawa Ltd.*, *supra*; *Ben Bruinsma and Sons Limited*; [1984] OLRB Rep. Nov. 1542; *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166). Even in circumstances where a (non-craft) incumbent trade union held bargaining rights for a broader bargaining unit, which included the applicant’s trade, in other than the ICI sector, the Board found it appropriate to permit a trade union applying for certification under section 144(1) to carve out its craft from the existing bargaining unit in the “appropriate geographic area” contemplated by that subsection (*D. L. Stephens Contracting Niagara Limited*, [1980] OLRB Rep. Oct. 1384).

46. It is evident that the Board has a well-established general practice of permitting a craft construction trade union to apply and be certified for a bargaining unit of employees engaged in its craft, whether or not such employees are in an existing bargaining unit represented by another trade union at the time of the application. This craft unit carve out practice in the construction industry contrasts with the practice in non-construction industry matters where the Board, in applications where a trade union seeks to displace an incumbent bargaining agent, generally finds the appropriate bargaining unit to be one described in the same terms as the existing unit.

47. Finally, while we are unaware of any case in which the Board has been faced with a carve out issue in an application for certification under section 144(3), we observe that in circumstances where none of the construction employees of a respondent employer are represented, the Board’s practice is to permit the applicant in such applications to apply for a bargaining unit described in terms of its trade or craft even if there were unrepresented employees in other trades or crafts at work for the respondent employer on the date of application. It is only where the applicant trade union seeks, in such an application, as it can, to represent employees in other than its usual or designated trade, that the Board has required it to apply for a bargaining unit described in terms of all unrepresented trades at work on the date of application.

48. In this case, Ellis-Don, Local 183, and the Form Work Council urge the Board to depart from what we have found to be the Board's general practice in the construction industry. Of course, no practice or policy can be more than a general guideline. The very nature of practices and policies is such that there must be limits and exceptions to them. Further, no policy or practice is, or should be, written in stone. To the extent that the Act allows it to be, the Board, and its practices and policies, must be responsive to developments in the real world of labour relations. The Board should be sensitive to such changes so that its policies and practices can evolve to accommodate them rather than requiring the labour relations community to adapt to the Board.

49. Locals 183 and the Form Work Council have a long history of organizing and representing employees involved in concrete forming work both generally and particularly in the residential sector of the construction industry in Board Area 8. We have already referred to the history of the Form Work Agreement (see, paragraph 31 above). The Board summarized this history at paragraphs 8-11 and 18, which formed part of a partial agreed statement of fact submitted to the Board in these proceedings, of *West York Construction Ltd.*, *supra*:

8. Historically, wooden forms built to take a concrete pour were disassembled after a pour and then re-built for the next pour. In the 1960's, however, there was a great increase in the construction of concrete high-rise apartment buildings in the Toronto area. Because of the repetitive nature of the buildings and the fairly short spans between vertical walls, residential concrete forming forms developed a procedure by which they could re-use the same forms. The forms were moved intact from one location on a building to another by way of crane. The movement of the forms by a crane became referred to as "flying" the forms, and the forms themselves became known as "flying forms". The use of flying forms greatly increased the speed of construction and also lowered the costs associated with the construction of high-rise apartment buildings. Because of the nature of most ICI projects, generally they have not been amenable to the use of flying forms. However, as a result of certain technological advances, there is now a growing use of flying forms in ICI sector concrete forming.

9. Initially, in the Toronto area concrete forming work on high-rise apartment buildings was performed on a non-union basis. The non-union employees who performed the work tended to work as a single "gang" or "crew", and while an individual employee might be particularly proficient in one aspect of the work, when not engaged in his speciality he would on other aspects of the work as well.

10. In the mid-1960's there were a number of attempts to organize employees in the residential concrete forming field. One of these attempts involved the formation of a council of unions known as the Council of Concrete Forming Trades Unions comprised of locals of the Carpenters, Cement Masons, Ironworkers and Labourers Unions, as well as Local 793 of the International Union of Operating Engineers. The Operating Engineers Union is a trade union that represents operators and its involvement in the Council reflects the fact that flying forms are actually "flown" by a crane. The Council of Concrete Forming Trades Unions proved to have no lasting organizing success. A more lasting organizing effort, however, was undertaken by Local 183. Local 183's approach involved taking into membership all employees engaged in concrete forming except the crane operators. In 1977 an association of concrete forming companies known as the Ontario Form Work Association entered into a collective agreement with Local 183 covering "all construction employees" employed by its member companies with the exception of crane operators represented by Local 793 of the Operating Engineers Union. Local 183 and Operating Engineers Local 793 subsequently entered into a council of unions known as the Form Work Council of Ontario. In 1979 this council entered into a collective agreement with the Ontario Form Work Association covering "all construction employees" of the forming companies belonging to the Association. Under this agreement, the crane operators were required to be members of Operating Engineers Local 793, while all other employees belonged to Local 183. Renewal agreements between the same two parties were entered into in 1981 and 1983. Although these agreements did not purport to limit their applicability to any one sector, the forming contractors belonging to the Ontario Form Work Association have generally performed the majority of their work in the residential sector. Further, we gather that the great majority of

firms engaged in high-rise residential concrete forming in the Toronto area are either bound by this agreement, or by separate but similar agreements....

11. For their part, the major apartment builders in the Toronto area have grouped themselves into an association known as the Metropolitan Toronto Apartment Builders Association (the "MTABA"). In May of 1970 the MTABA entered into a collective agreement with Local 183. On November 28, 1975 the then current agreement between Local 183 and the MTABA was amended so as to require that members of the MTABA "not ... sublet concrete forming to sub-contractors other than those who are in contractual relationship with the union". It appears that this clause has been included in all subsequent agreements between the same parties....

18. The evidence indicates that since the early 1970's most high-rise apartment construction in the Toronto area has been performed pursuant to the terms of the MTABA-Building Trades Council and MTABA-Local 183 agreements. Pursuant to the MTABA-Local 183 agreement, apartment developers have sublet the concrete forming work to contractors employing Local 183 members. Pursuant to the terms of the agreement between the Ontario Form Work Association and the Form Work Council of Ontario, these contractors have employed members of Local 793 of the Operating Engineers Union to operate the cranes and members of Local 183 to do all of the remaining work, including building the forms, setting the reinforcing rods and pouring and finishing the concrete. Many members of Local 183 are in fact specialized in one aspect of the work, but when an employee's special skills are not required, he may perform other types of work, including assisting other members working at their specialties. On low-rise apartment buildings, flying forms may not be used. In these cases, members of Local 183 build the forms and then disassemble them after each pour. As already indicated, the contrast to the procedures utilized in the residential sector, most unionized ICI concrete forming is performed pursuant to the terms of the provincial agreements of the various trades, with members of the carpenters union building and repairing the forms.

50. Local 27 has been active in organizing carpenters and carpenters' apprentices involved in form work in the ICI sector but it has no history of organizing at all comparable to that of Local 183 and the Form Work Council within the residential sector in Board Area 8. Further, the building, erecting, and setting of forms have not been recognized as being a separate trade or trades. In the ICI sector of the construction industry, trade union organization and representation has been primarily on a trade basis. However, the union organization and representation of such employees in the residential sector of the construction industry in Board Area 8, has been largely on a multi-craft or composite crew basis rather than by trade as such. For over thirty years, the Board has recognized that concrete forming construction in the residential sector of the construction industry is generally performed by employees working as a crew and with each member of the crew exercising the skills of more than one craft and being interchangeable with other members of the crew (see, for example, *Peniche Construction Forming, supra*). As a result, it appears that carpenters and carpenters' apprentices employed doing concrete form work have some community of interest with other form workers. In that respect, Form Work and Form Work style agreements to which the Form Work Council and Local 183 are bound have, on the evidence before the Board, adapted to the needs of and changes in the construction industry and, as such, have worked to the benefit of both employers and employees covered by them. In that respect, that there was no suggestion that carpenters or carpenters' apprentices have not been properly represented under the Ellis-Don Form Work style or any other form work style agreement to which Local 183 or the Form Work Council are party, and Ellis-Don argued that permitting the carve out requested by Local 27 would generally reduce the efficiencies of its "production" and supported Local 183's and the Form Work Council's submission that such a carve out would destabilize and generally put the high rise residential construction industry back twenty years.

51. One of the Board's fundamental concerns when it deals with an application for certification is that the parties begin their relationship with a bargaining unit structure conducive to ongoing collective bargaining. In that respect, fragmentation, which can, especially in the construction

industry, lead to jurisdictional disputes, picketing problems, and strike oriented lay-offs, is to be avoided for both labour relations and "efficiency of production" reasons.

52. Also, while the demarcations between trade jurisdictions in the construction industry have never been completely clear, these demarcations have, in recent years, become even more blurred, and concomitantly the areas of overlap between trade jurisdictions have grown. This is due in part to changes in the construction industry itself. For example, it is no longer fair to say, if ever it was, that construction labourers are, as a general rule, unskilled and unsophisticated workers. Another reason for this development is the aggressive approach taken by the Labourers' International Union of North America to expanding its trade jurisdiction in circumstances where the very nature of its trade means there is a potential for, if not an actual, overlap between it and virtually every other trade in the construction industry. Perhaps the most obvious struggle in that respect has been the one between the Labourers' International Union of North America and the United Brotherhood of Carpenters and Joiners of America in the residential sector of the construction industry in Board Area 8.

53. Consequently, there are a number of factors which weigh against permitting Local 27 to carve out these carpenters and carpenters' apprentices employed by Ellis-Don who are covered by the Ellis-Don Form Work style agreement.

54. On the other hand, the concrete forming construction work relationship between Ellis-Don and the Form Work Council is both relatively short and different in nature from the concrete forming construction bargaining relationships excluded from the general designation order for the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council (see para. 36 above). The Ellis-Don Form Work style agreement is limited in its application to concrete forming construction in the residential sector in Board Area 8 and the County of Simcoe. Further, while concrete forming construction is generally performed by employees working as a composite crew, the classification schemes in the Form Work and Form Work Style agreements suggest that members of such a crew do not exercise so similar a combination of skills to be entirely interchangeable. The evidence establishes that many concrete formworkers specialize in an aspect of concrete forming work. Although this specialization may not be precisely along craft lines, it does tend to follow them. It is not the fact that they are formworkers that makes it difficult to determine what craft any given employee is engaged in. It is the blurring of the craft lines themselves which does this. In any case, the fact that employees work in a composite crew does not mean that carpenters cannot be distinguished from labourers, even when the work being done by the employee(s) in question falls within the overlap between the two trade jurisdictions.

55. We also observe that fragmentation of bargaining units has always been (and is) the rule rather than the exception in the construction industry, largely as a result of the very nature of that industry. This is reflected in the way in which both construction employers and construction trade unions have generally structured their affairs, and in the nature of the employment relationship in the construction industry (see para. 40 above). That has not prevented the construction industry from prospering in either the ICI or other sectors. In some sectors (for example, ICI, pipeline and electrical power systems) composite crews of employees from different trades have been used to decrease the inefficiencies that result from such fragmentation. One result, perhaps, is that the lines between crafts have become more blurred. However, the fundamental nature of the construction industry; that is, its craft orientation and basis, has not been significantly altered.

56. In addition, the right of self-determination, which is one of the fundamental bases of the *Labour Relations Act*, favours permitting craft carve outs in a craft oriented industry. In that

respect, we note that precluding craft carve outs could severely limit the opportunity for tradesmen to opt for representation by their craft union in circumstances where some other trade union had previously obtained bargaining rights which included that craft. We have also already indicated (in paragraph 41, above) the extent to which the *Labour Relations Act* itself recognizes the craft nature of the construction industry. In that regard, we note that section 6(3) deems craft units to be appropriate. Although the Board is not required to apply section 6(3) where the craft employees are included in an existing bargaining unit, the insertion and subsequent deletion of the provisions referred to in paragraph 38 above suggests that the fact that an existing bargaining unit consists of employees exercising a combination of skills of more than one craft as part of one crew is not a factor which should weigh against carving out employees in one of the crafts into a separate bargaining unit. Indeed, in the ICI sector of the construction industry, craft carve outs are mandatory for applications for certification to which sections 144(1) of the Act applied. Similarly, by virtue of the definitions in sections 137(1), section 144(3), under which the application with respect to Ellis-Don has been brought, deems a craft unit of the kind Local 27 seeks to be appropriate for collective bargaining. That is so whether or not the craft employees in question happens to be in a bargaining unit represented by another trade union at the time the application (so long as it is timely) is made.

57. In the result, the nature of and history of organization in the construction industry and the right of self-determination favour permitting Local 27 to carve out the carpenters and carpenters' apprentices now represented by the Form Work Council under the Ellis-Don Form Work style agreement. The structure of the *Labour Relations Act*, and particularly the provisions relating to the construction industry, does so as well.

58. In the result, we find that the MTABA has no status to participate in any of these three applications. We further find that Local 183 has no status to participate in the applications in Board File Nos. 3457-86-R and 0250-87-R at all, and no status in the application in Board File No. 3291-86-R except as a constituent trade union of The Form Work Council of Ontario. The Form Work Council of Ontario does have status to participate in Board File No. 3291-86-R.

59. In Board File No. 3291-86-R, the Board finds that all carpenters and carpenters' apprentices in the employ of the respondent (Ellis-Don) in all sectors of the construction industry, except the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

60. The Registrar is directed to schedule Board File No. 3291-86-R for hearing for the purpose of hearing the evidence and representations of the parties with respect to all matters remaining issues including, but not limited to:

- (a) who is the proper respondent and Local 27's request for relief under section 1(4) of the Act;
- (b) the list of employees in the bargaining unit;
- (c) the pre-hearing vote which was requested and held.

61. In Board File No. 3457-86-R, the Board finds that, having regard to our conclusions as aforesaid, all carpenters and carpenters' apprentices employed by the respondent (Milne & Nic-

holls Ltd.) in all sectors of the construction industry, except the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

62. It appears that the Board could dispose of the application in Board File No. 3457-86-R on the basis of the material already before it and the Board will do so unless a party can suggest a cogent reason, in writing, for the Board not to do so within 14 days of the date hereof.

63. In Board File No. 0250-87-R, the Board finds that, having regard to our conclusions as aforesaid, all carpenters and carpenters' apprentices employed by the respondent (Mollenhauer Limited) in all sectors of the construction industry, except the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

64. The Registrar is directed to schedule Board File No. 0250-87-R for hearing for the purpose of hearing the evidence and representations of the parties with respect to all remaining matters arising out of and incidental to the application. Board File No. 0484-87-U is a section 89 complaint related to the application in Board File No. 0250-87-R and should be scheduled to be heard with it.

0757-88-R Gilles Delage, Applicant v. Hotels, Clubs, Restaurants and Taverns Employees' Union, Local 261, Respondent v. Real Delage, King George Hotel, Intervener

Petition - Termination - Fifty percent of bargaining unit comprised of employees who were closely related to the owners of the business - Signatures of family members on petition found voluntary - Vote ordered

BEFORE: *R. Herman*, Vice-Chair, and Board Members *J. A. Rundle* and *E. G. Theobald*.

APPEARANCES: *Bruce MacPhee* for the applicant; *Peter R. Seguin* for the respondent.

DECISION OF R. HERMAN, VICE-CHAIR, AND BOARD MEMBER J. A. RUNDLE; November 16, 1988

1. This is an application under section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees of the King George Hotel in the bargaining unit for which it is the bargaining agent.

2. The parties agree that this application is timely, and it appears from the documentation filed with the Board in respect of this matter that the application is timely.

3. The bargaining unit in question can be described as all employees of the intervener in Cornwall, Ontario, save and except manager, and persons above the rank of manager. For the purposes of clarity, it is agreed that Real Delage and his wife, Colette Delage are excluded from this bargaining unit as they are owners of the intervener business.

4. The applicant was an employee within the above described bargaining unit at the time in question, and there were in total six employees in the bargaining unit as of that time.

5. The hotel was bought by the current owners around June or July of 1987. The respondent union had bargaining rights with respect to the business long before Real and Colette Delage bought it. In essence the operation consists only of three bars on the hotel premises, and the six employees all work in one or more of these three bars, acting as waiters or waitresses or behind the bar. The composition of the six person workforce breaks down as follows: two daughters of the main owner, Real Delage, who also live in the basement of the owner's house; Gilles Delage, the applicant in this matter and Real Delage's brother; and three other employees who are in no way related to either of the owners. As can therefore be seen, fifty per cent of the bargaining unit is comprised of employees who are closely related to the owners of the business. The daughters appear not only to live with their parents, but to have worked in their parents' businesses for many years before the acquisition of the King George Hotel. In contrast, the applicant has never worked for his brother prior to his working at the King George Hotel, and does not regularly and routinely socialize with the owners outside of the work context.

6. From the time the current owners bought the business, Real Delage made clear to his daughters and his brother that he didn't feel a union was necessary in a small family run business of the nature of the King George Hotel, and that he felt it inappropriate that he had to deal with a union.

7. The respondent union filed an unfair labour practice complaint, arising out of the failure of the owners to remit union dues to the union, and that complaint was settled between the parties around the end of January, 1988. When that matter was being discussed, with the assistance of a Board Officer, the applicant Gilles Delage accompanied his brother Real, the owner, and together they were involved in the settlement discussions. At some time while the unfair labour practice complaint was being discussed, but not forming part of settlement discussions, the applicant asked the Board Officer how to go about terminating the union. He was advised to contact the Board for written information in that regard, which he subsequently did and which resulted in the Board sending to him pre-printed information about rights of employees under the Act.

8. The applicant then decided to seek termination of the union's bargaining rights, and proceeded to obtain the signatures of all six employees in the bargaining unit on a petition seeking to terminate the bargaining rights of the union. All those signatures were obtained at work, with neither owner present, but during the employees regular working hours. Five employees, including the applicant, signed when first asked. One employee, Brissard, initially declined to sign, indicating he wanted to speak to the union first, but when asked again several days later, he did sign the petition.

9. At the conclusion of the hearing, the majority of the Board, Board Member Theobald partially dissenting, delivered an oral decision finding that three of the six signatures on the petition were voluntary and that accordingly a vote would be directed. We now set out in writing those reasons.

10. This is a unique case which involves rather unique circumstances. All six of the employees in the bargaining unit have signed a petition, and three of them are close family members of the two owners. We note that there was no suggestion, nor did the evidence suggest, that any of the owners' relatives were hired as employees in any improper fashion. The owner Real Delage made clear to his three family members that he did not want a union to represent the employees of his business. These three relatives worked closely with the other three employees. While employers need not want a union and can certainly prefer to do business without a union, they are not free to interfere with the wishes of employees with respect to representation. When the Board looks at the individual factors the Board usually considers in trying to determine whether a particular signature is voluntary, and whether the employer has attempted to influence employee choice, most factors present here would suggest that all the signatures are involuntary.

11. Turning first to the three non-family members of the bargaining unit, we are satisfied that these three employees would likely have known of Real Delage's views with respect to the union, and together with the circumstances of their signing a petition, with the brother of the owner asking them to sign, at work during working hours, the Board is satisfied that they might well have been concerned that the owner would know whether or not they had signed. With respect to their signatures therefore, the Board is not satisfied they are voluntary.

12. However, it is a different situation with respect to the family members. But for the close family relationship and the nature of the business, we would have found their signatures also to be involuntary. With respect to the two daughters, the majority of the Board viewed them as being in a sense part of the owner and part of the operation of the business. They live in the same house as the owner, in a separate apartment in the basement. They have derived their livelihood from their father's different businesses for numerous years, and at least one daughter (the only daughter who testified) indicated that she helped out in unofficial capacities with this business, beyond working in the bar. Notwithstanding the majority's recognition that the two daughters would have great difficulty in these circumstances in holding a view with respect to union representation contrary to their father's, we were still satisfied that their signatures were voluntary. On all the evidence, we were satisfied that the daughters really did share their father's view with respect to union representation, that this particular business did not need nor did it benefit from the presence of a union as bargaining agent. The majority of the Board therefore concluded that their signatures were voluntary.

13. The signature of the brother is pivotal. Should the Board conclude that his signature is voluntary, the applicant will have obtained the voluntary signatures of fifty per cent of the bargaining unit and accordingly a vote would be directed. Should his signature be found to be involuntary, this application will be dismissed. The brother is admittedly not in the same position as the two daughters, in that he is not part of the family in the same sense as are the two daughters. He has not participated in family affairs, whether business or social, to anywhere near the extent of the daughters. On the other hand, even at the time of the settlement discussions concerning the unfair labour practice complaint, the applicant participated with his brother in those discussions and in effect was acting together with the business owner. It might well be that the applicant, as with the daughters, would have an exceedingly difficult time in going against the known wishes of his brother with respect to the union presence in the business. But, as with the daughters, we must ask ourselves whether his involvement in this proceeding was symptomatic of his being pressured by or perceiving he was pressured by his brother Real, in which case his signature will be found to be involuntary, or whether he does in fact share his brother's view with respect to union representation. On balance, and in the unique circumstances before us, the majority of the Board was satisfied that the applicant shared his brother's view with respect to union representation and we find that his signature is voluntary. We therefore find that fifty per cent of the signatures are voluntary.

14. The Board was unanimously of the view that it appeared from the evidence that Real Delage might well have crossed the line with respect to permissible expression of views with respect to union representation. All employees (family or otherwise) and the employer must understand that the decision is solely for the employees to take, and a decision to be taken in confidence. Should the union win the vote, and this application be dismissed, the union will retain bargaining rights and the owners must continue to bargain with and deal with the union. Any behaviour of the employer crossing permissible lines can be the subject of a complaint or complaints pursuant to section 89 of the Act, alleging that an unfair labour practice has occurred. Through such a mechanism the Board can ensure that employees' and the union's rights are protected.

15. Accordingly, the majority of the Board finds that not less than forty-five per cent of the employees of the intervenor in the bargaining unit at the time the application was made had voluntarily signified in writing that they no longer wished to be represented by the respondent on August 22, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 57(3) of the Act.

16. The Board directs that a representation vote be taken of the employees of the intervenor in the bargaining unit. Persons employed in that unit as of November 10, 1988, who are so employed on the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with the intervenor.

18. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER E. G. THEOBALD;

I dissent in part as noted in the majority decision.

0721-88-M John Kozak, Complainant v. Local 27, United Brotherhood of Carpenters and Joiners of America, Respondent

Financial Statements - Complainant under s.85(2) arguing that union's financial statements inadequate because they were audited by a Certified General Accountant rather than a Chartered Accountant - Board looking at jurisprudence under s.85(1) - No evidence that the audit was inadequate - Complaint dismissed

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. W. Pirrie and P. V. Grasso.

APPEARANCES: John Kozak for the complainant; David McKee and Frank Rimes for the respondent.

DECISION OF THE BOARD; November 25, 1988

1. This is a complaint under section 85(2) that an audited financial statement furnished by

the respondent union (Local 27) is inadequate. Specifically, the complaint states that the audited financial statements for the fiscal year ending 1987 is inadequate because they were not complete for the fiscal year ending 1987 and were not audited by a Chartered Accountant. The union maintains that the audit which was done of the statements prepared by a C.G.A. (Certified General Accountant) are adequate within the meaning of the section, there being no requirement that a Chartered Accountant perform these functions.

2. The Board heard evidence from Mr. John Edmunds, C.G.A., who prepared the statements complained of, and from Mr. Frank Rimes, Business Manager and Treasurer of Local 27. Mr. Kozak was given full opportunity to present evidence but did not call witnesses. He cross-examined the respondent's witnesses and presented the documents he had received from Local 27 as well as the constitution of the United Brotherhood of Carpenters and Joiners of America, dated January 1, 1987. Both parties made submissions. The Board recessed to consider the evidence and submissions and then dismissed the complaint orally giving the following reasons:

The Board has considered the evidence of the particular inadequacies complained of by the complainant at the hearing which we will deal with in turn:

- a) The complainant complains that the financial statements only covered six months of 1987. The Board is convinced that the statements cover a full fiscal year which commences on July 1, 1986 and ends on June 30, 1987. The statements at the front of the financial statements say that the statements cover the year ended on June 30, 1987.
- b) The complainant says that the statements were not properly audited. This had three aspects as presented at the hearing, as follows. Mr. Kozak asserts that:
 - i) The union's constitution requires a Chartered Accountant to audit the financial statements.
 - ii) The individual who performed the audit and prepared the statements is not qualified to do so as he is not a Chartered Accountant and he has been charged under the *Public Accountancy Act*.
 - iii) The functions of inquiry, comparison and discussion mentioned in the financial statements do not constitute an audit.

Although we do not, under section 85 have the authority to enforce the union's constitution, we would note that on its face the section of the Constitution to which we were referred, section 40(c), does not state explicitly that the books have to be audited by a Chartered Accountant but calls for local unions having annual receipts amounting to \$ 25,000 or more to engage a "Certified or Registered Public Accountant for periodic audits, but not less than once a year." Furthermore, the *Labour Relations Act*, section 85 does not provide that an audit has to be done by a Chartered Accountant. The charges which have been laid against Mr. Edmunds are in reference to the matter of licensing under the *Public Accountancy Act* and refer to an allegation that he was practising as a Public Accountant. The charges do not appear to challenge Mr. Edmunds' qualifications as a Certified General Accountant or the accuracy of either the

financial statements prepared or the audit performed. We do not find that the use of a C.G.A. instead of a Chartered Accountant is evidence of inadequacy of the financial statements. Furthermore, the uncontradicted evidence of Mr. Edmunds is that he performed an audit of the statements, comparing original documents with the control records. The complainant makes no specific allegation of any impropriety in the audit other than his statement that he did not think what Mr. Edmunds had done, as summarized in the statement at the front of the financial statements, constituted an audit. We have no evidence on which we could base a finding that the audit was inadequate or that no audit was done.

- c) The complainant further alleges that the financial statements did not provide enough detail. The uncontradicted evidence is that the financial statements were prepared in accordance with generally accepted accounting principles and we have no evidence on which to base a contrary finding.

Furthermore, the items of detail enumerated by the complainant as things that he thought were missing from the financial statements were explained in evidence to the Board's satisfaction and in fact are part of the financial statements. Specifically, Mr. Edmunds explained that petty cash is included in the item "Cash" in the financial statements which is made up of cash in the bank and petty cash in the custody of the bookkeeper. The union operates no welfare fund, another detail that the complainant argued was missing from the statements. Since it maintains no welfare fund, there is no need for it to be in the financial statements. Furthermore, the complainant wanted to know whether there were other financial statements that have been prepared that he had not received. The evidence established that there were no other statements.

- d) Mr. Kozak has asked us to order the union to have a Chartered Accountant audit the financial statements. Although we have the authority to do so under section 85(2) we would need some evidence of inadequacy of the financial statements provided on which to base the exercise of our discretion to order such a further audit. Since the evidence did not disclose any inadequacy in the financial statements provided, we are unwilling to order the union to have the statements audited by a Chartered Accountant. We understand that the complainant's goal is to have the union annually engage a Chartered Accountant to audit the financial statements. In order to achieve that, the complainant would appear to need a legislative amendment or an amendment to the union constitution. We therefore dismiss the complaint.

3. We would also note that the question of whether or not section 85(1) imposes an obligation on the union to have its financial statements audited by a Chartered Accountant was dealt with in the *Reginald Robert* case, [1984] OLRB Rep. August 1125. Although the actual issue before us in this case was the question of adequacy under section 85(2), the discussion in paragraphs 27 of the *Reginald Robert* case of the meaning of the word audit in section 85 and the

absence of an obligation in section 85(1) to engage a Chartered Accountant is highly relevant to this case. At paragraph 29, in particular, the Board held that the essential component of an audit is some "distance" between the person or group which conducts the examination and the person or group which recorded the accounts initially. A second essential component was said to be the competence of the person or group conducting the examination. We are satisfied, in the absence of evidence to the contrary, that these two components exist in this case. Mr. Edmunds' qualification as a Certified General Accountant and the fact that he conducted a review of the books and prepared the financial statements according to generally accepted accounting principles, is sufficient basis to find that there was no inadequacy in the audit.

4. We were also referred to a number of other decisions of the Board including the *Tony Hossain* case, unreported decision dated December 14, 1987, Board File numbers 1169-87-M and 1170-87-M, which dealt with a complaint on similar grounds about the same set of financial statements, which was settled. The matter then before the Board was whether or not the complainant could reopen the matter on the basis of a letter received from the Public Accountants' Council. Although the basis for the decision was that the matter had been settled, the Board observed at paragraph 11:

A comparison of the language used in sections 85(1), 85(2) and 86(2) of the Act indicates that the "audited financial statements" contemplated by section 85(1) need *not* be prepared or certified by a person licensed under the *Public Accountancy Act* unless the Board so directs. In the absence of such direction, the financial statements which a trade union prepares for its own use (and must be provided to its members upon request pursuant to section 85(1)) may, therefore, be prepared by a C.G.A....

We agree with that observation.

3339-87-R; 3530-87-U International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Applicant v. **Kuhlman Plastics of Canada Ltd.**, Respondent v. Group of Employees, Objectors; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Complainant v. Kuhlman Plastics of Canada Ltd., Respondent

Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practice - Employer's announcement of wage increases and other benefits, support for in-plant committee, statements made at employee meetings, support for petition and recall from layoff of most junior employee constituting contraventions of the Act - Union certified without a vote pursuant to s.8

BEFORE: Ken Petryshen, Vice-Chair, and Board Members J. W. Murray and P. V. Grasso.

APPEARANCES: Elizabeth Mitchell, Dennis Cooper and Don Caryn for the applicant/complainant; Chuck R. Robertson, F. Heerema and Edward L. Klopfenstein for the respondent; J. H. McNair and Brad Horan for the objectors.

DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO;
December 19, 1988

1. The Board (differently constituted in part) consolidated the matters in Board File Nos. 3339-87-R and 3530-87-U on agreement of the parties on April 8, 1988, the first day of hearing. Board File No. 3339-87-R is an application for certification made by the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (hereinafter referred to as the "UAW") against Kuhlman Plastics of Canada Ltd. (hereinafter referred to as "Kuhlman"). Board File No. 3530-87-U is a complaint under section 89 of the *Labour Relations Act* in which the UAW alleges that Kuhlman contravened sections 64, 66, 70 and 79 of the Act. By letter dated March 24, 1988, the UAW advised that it was seeking certification pursuant to section 8 of the Act in the event it was not entitled to outright certification.

2. During the first day of hearing, the previous panel found that the UAW is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. That panel also found the appropriate bargaining unit for this application to be as follows:

all employees of the respondent at Blenheim, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff.

Clarity Note: For purposes of clarity, the parties agree that students who work in the plant on a co-operative grant scheme, administered by government, who are not paid salary or wages by the respondent, are not employees of the respondent for purposes of this application.

3. On March 9, 1988, the date of the application for certification, there were 30 employees in the bargaining unit. As of March 25, 1988, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the Act to be the time for the purpose of ascertaining membership under section 7(1) of the Act, 16 employees in the bargaining unit (53%) were members of the UAW. Therefore, the UAW is in the position where it is entitled under section 7(2) of the Act to a representation vote. In addition to the UAW's membership evidence, there was also filed with the Board a petition signed by 21 persons indicating that they wish to oppose the certification of the UAW. Of those 21 persons, 6 had previously signed membership card for the UAW.

4. The present panel was scheduled to entertain the evidence and submissions of the parties concerning the UAW's request that it be certified without a vote pursuant to section 8 of the Act. Certification can be granted under that section only if the following conditions are met:

- (1) The respondent employer must have contravened the *Labour Relations Act*.
- (2) The applicant trade union must have membership support that, in the opinion of the Board, is adequate for the purposes of collective bargaining.
- (3) The respondent employer's contravention of the Act must have resulted in a situation in which the wishes of the employees are not likely to be ascertained.

During final argument, counsel for the objecting employees and counsel for Kuhlman agreed that the UAW had membership support adequate for the purposes of collective bargaining. In view of the parties' positions on this issue and given the evidence before us, the Board finds that the UAW does have membership support adequate for the purposes of collective bargaining. The Board is

left then with deciding whether conditions (1) and (3) set out above have been met and, if so, whether it is appropriate to exercise its discretion under section 8 to certify the UAW.

5. Kuhlman called M. Laporte, the general manager at the Blenheim plant, E. Kluka, a supervisor, and S. Singh, a former supervisor, to give evidence. B. Horan, P. Knight and J. Thorpe, employees in the bargaining unit, testified on behalf of the objecting employees. The UAW called K. Riha, J. Barnes, P. Pardo and D. Cooper, also employees in the bargaining unit, to testify. In making its findings of fact, the Board assessed the credibility of the witnesses according to the usual criteria, weighed and assessed the testimony in the context of the relative credibility of the witnesses, the documentary evidence and what is reasonably probable in the circumstances.

6. At the Blenheim plant, Kuhlman manufactures plastic products, primarily fuel tanks for the automobile industry. The parent company of Kuhlman is Kuhlman Corporation Plastics Group, located in Troy, Michigan. The primary reason for establishing a plant in Canada was to supply the AMC plant in Bramalea with plasticized fuel tanks. Kuhlman purchased its Blenheim plant in July 1986 and Laporte started as general manager on July 15, 1986. Laporte worked out of his house until the plant was ready on August 16, 1986. In September 1986, Laporte began the task of hiring employees with the expectation that Kuhlman would begin shipping products to AMC in Bramalea by February 1987. Although Kuhlman was ready to send products to AMC for that target date, for reasons not here relevant, AMC was not ready to take the product. AMC delayed the target date to August 1987 and again to October 1987. These delays caused Kuhlman to lay off most of its employees at the Blenheim plant. When deliveries began to AMC, Kuhlman started with one shift, before the end of October 1987 it established two shifts and before the year was over, Kuhlman was producing on a three shift basis.

7. The UAW began its organizing campaign in December 1987 and, as noted earlier, it applied for certification in March 1988. Although he heard some rumours previously, Laporte testified that the first concrete evidence he had of the UAW's organizing effort was when an employee advised him on January 26, 1988 of a contact from a UAW organizer. The UAW alleges that Kuhlman committed a number of unfair labour practices subsequent to the time Kuhlman became aware of its organizing campaign. On February 4, Kuhlman announced to employees a wage increase as well as the provision of certain other benefits. Beginning in February 1988, Laporte contacted the three senior employees regarding their views on an in-plant committee which was eventually established. Subsequent to the posting of the Notice to Employees concerning the UAW's application for certification, Kuhlman held two meetings with employees, one on March 21 and one on March 23. It is alleged by the UAW that the holding of these meetings with employees and certain statements made at the meetings by Laporte constitute contraventions of the Act. The UAW alleges that Kuhlman supported the petition and that certain foremen made threats to certain employees concerning their job security. Finally, two employees were laid off on April 4, 1988. Shortly after the lay-off commenced, the junior of these two employees was recalled for a brief time. Although the UAW does not challenge the legality of the initial lay-off, it alleges that the recall of the most junior person rather than K. Riha contravene the Act.

8. Before dealing with each of the alleged contraventions of the Act, we will refer to some of the evidence called by Kuhlman concerning its brief history and its business philosophy. This evidence was called in order to provide a context to the events and conduct of Laporte subsequent to January 26, 1988.

9. Laporte gave some detailed evidence concerning Kuhlman's and his own business philosophy and objectives. One of Kuhlman's main objectives is to remain non-union. Laporte

explained that he is not anti-union *per se* but that the philosophy of Kuhlman and how that philosophy is translated into how Kuhlman operates its business, would not likely meet with the approval of a trade union. For instance, Kuhlman operates, for the most part, with a group rate of pay. In other words, there is essentially one rate for all employees and employees are trained to perform all aspects of all the production jobs in the plant. Length of service does not impact on the group rate of pay. Laporte's business philosophy led to his establishing a number of objectives, including the provision of satisfactory pay and benefit levels, immediate response and solutions to legitimate complaints and plant personnel involvement in decision-making and training.

10. The evidence demonstrates that Laporte's philosophy and objectives caused him to act in certain specific ways. It was common for him to go on the plant floor in order to deal with employees on a one-on-one basis. In this way, he was able to hear their concerns and attempt to address them immediately. Meetings were frequently held in the pre-production period between management and employees in order to deal with the sorts of matters a newly-opened plant would have to grapple with. When production began, meetings with employees continued but on a reduced basis. Some surveys were conducted in order to ascertain the needs and concerns of the employees. Laporte initiated a newsletter, the first of which was issued to employees in November 1987, in order to keep employees informed of developments. Counsel for Kuhlman argued that in order to understand Laporte's conduct subsequent to January 26, 1988, it was important to keep this evidence in mind. In counsel's submission, given the "exploding" nature of the business after September 1987 and Laporte's hands-on approach, this evidence supports the argument that Laporte acted in a consistent manner both before and after he knew of the union's campaign and was not reacting to the presence of the union subsequent to January 26, 1988 when he acted in the way he did.

11. In reviewing the alleged misconduct, the Board, of course, looks to all of the relevant evidence before it. The Board's task is to determine whether the Kuhlman's conduct, either in whole or in part, was motivated by anti-union considerations. In reviewing the evidence relating to the alleged contraventions of the Act, the Board has considered all of the evidence called by Kuhlman for the purpose of providing a context to the events subsequent to January 26, 1988.

WAGES AND BENEFITS

12. In October and November 1987, employees were telling Laporte that their hourly rate was not high enough. In mid-October, Laporte conducted a survey of the employees in which they filled out a written form answering the general questions contained therein. Laporte conducted, as well, a wage survey of the union and non-union original equipment manufacturing facilities in the local area and determined that Kuhlman was paying a wage on the low side. In preparing the budget for the Blenheim plant, which was submitted to Troy on December 1, 1987, Laporte factored in a \$1.00 an hour increase for the employees as well as an increase in the employee gain-sharing program. Although this budget was approved in December 1987, no announcement or implementation of the increase occurred at that time since Laporte's superiors determined that a professional survey (an Employee Attitude Survey) would be conducted for the Blenheim employees. This survey was conducted on December 7, 1987 and the results of the survey were available to Laporte when he returned from a vacation in mid-January, 1988. In the latter part of 1987, there was discussion between Laporte and his superiors with respect to paying the employees' OHIP premiums. On December 23, 1987, Laporte announced to the employees that Kuhlman would pay their OHIP premiums effective January 1, 1988.

13. The day after Laporte had some concrete evidence of the UAW's organizing campaign, he attended a meeting in Troy, Michigan in which a number of matters relating to the Blenheim

plant were discussed. Laporte testified that he did not advise any of his superiors at the meeting about the UAW's organizing effort and that he did not do so until approximately mid-February. At a meeting of employees at Blenheim on February 4, 1988, J. Leadford, Vice-President out of Troy, advised employees of Kuhlman's five-year long range plan while Laporte discussed wages, benefits and other matters. Laporte advised employees in effect that their hourly rate would increase \$1.00 per hour effective February 1, 1988, once the sixty-day probationary period was completed and that there would be an increase in the split the employees would receive from the gain-sharing program. Laporte also announced that Kuhlman would soon implement a benefit package for the Blenheim employees consisting of life insurance, a dental plan and a sick bank. It is argued by the UAW that the increase in the wage rate and the provision of the benefits referred to at the February 4 meeting constitute contraventions of sections 64 and 70 of the Act.

14. Although the announcement on February 4 of the wage increase and the change to the gain-sharing program came virtually on the heels of Laporte's being advised of the UAW's organizing campaign, the Board is satisfied that Kuhlman did not contravene the Act when it announced and implemented these changes. Employees expressed concern over the wage level by October 1987 and attempts were made by Laporte to ascertain what various employers were paying around Blenheim. The 1988 budget provided for a wage increase which was not implemented in December since the professional survey was being done and would not be discussed until January 1988. In reviewing all of the circumstances, the Board finds that the increase in wages and the change to the gain-sharing program were not made in response to Laporte's recent knowledge of the UAW's organizing efforts, but were the culmination of a process which began in October 1987. However, we have a different view regarding the announcement of the benefits which would be implemented at some point subsequent to the February 4 meeting. In attempting to meet the demands of employees, the focus of Kuhlman's concern appears to have been the wage level. This is not to suggest that benefits were not of some concern to employees and that Kuhlman did not give some thought to the benefit situation. Laporte did announce on December 23, 1987 that Kuhlman would pay for the OHIP premiums beginning January 1, 1988. But the evidence before us does not reveal that other benefits were being considered along with the payment of the OHIP premiums. Although the professional survey did address benefits and this was a matter discussed at Troy on January 27, 1988, when we review all the evidence relevant to this issue, the Board concludes that part of the reason for the announcement of benefits and their subsequent implementation was related to the UAW's organizing campaign. Our sense of the evidence, particularly Laporte's testimony, is that but for the presence of the UAW, the employees would have only received effective February 1 an increase in wages and an improved split in the gain-sharing program. We are satisfied that the February 4 announcement relating to life insurance, a dental plan and a sick bank was, at least in part, made by Kuhlman in order to influence its employees concerning the matter of union representation. Accordingly, the Board finds, given the timing of the announcement as well as all the circumstances, that Kuhlman's announcement on February 4 and the subsequent implementation of life insurance, a dental plan and a sick bank contravenes section 64 of the Act.

THE IN-PLANT COMMITTEE

15. In his evidence, Horan, the representative of the objecting employees, indicated that in December 1987, shortly after the UAW's organizing campaign began, a few employees discussed the possibility of forming a committee of employees to deal with management. Horan testified that the discussion did not lead to anything concrete or to any discussions with management since he was concerned about what Kuhlman's response might be. Certain discussions among some employees along the same lines occurred in January 1988 but again went nowhere since these employees were unable to think of a way to approach Kuhlman. After he became aware of the UAW's presence and after the January 27, 1988 meeting at Troy, Laporte decided he would determine if the

employees were interested in the formation of an in-plant committee of employees. During the second week of February 1988, Laporte approached the three most senior production employees on an individual basis and asked them if they would be in favour of such a committee. Given the positive response of the three employees, the following notice to employees was prepared by certain employees and signed and distributed to plant employees by M. Vangassen:

February 16, 1988

MEMO TO: ALL PLANT EMPLOYEES
Kuhlman Plastics of Canada Ltd.

SUBJECT: KUHLMAN PLASTICS EMPLOYEES ASSOCIATION

Management requests that we form a committee to address the concerns occurring in the work environment.

We would like you to participate by selecting five (5) names from the attached list to head up the Kuhlman Plastics Employees Association.

The duties of this committee will be determined with the co-operation of management.

Would you please deposit completed sheet in box found in T. GIBBS office.

M. VANGASSEN

Although the reference in the notice was to the "Kuhlman Plastics Employees Association", everyone commonly referred to the newly-created entity as a committee. Laporte's secretary typed the notice which had been reviewed by Laporte. The attached list referred to in the notice contained the names of the plant employees who had completed their probationary period. The employees completed "ballots" which were then deposited in a box in the office of T. Gibbs, a supervisor. A number of decisions, such as the number of employees on the committee and how they would be selected, were made by employees. Horan and P. Knight were two of the five persons elected to the in-plant committee. Laporte prepared a notice to employees dated February 25 advising them which employees were elected to the committee and this notice was distributed to the employees with their pay cheques.

16. The in-plant committee was to act as a communication link between employees and management. Employees were to bring concerns or problems to committee members for resolution by the committee. The first meeting of the committee took place on March 1, 1988. After Laporte suggested that the employees on the committee should select a spokesperson, Horan was selected as a spokesperson. At this meeting, there was a discussion about a "grievance form" which was eventually developed and used by employees. The Minutes of the meeting were signed by Laporte and posted for employees. A second meeting occurred on March 8, 1988. When asked by Kuhlman's counsel why meetings of the in-plant committee were held so quickly, Laporte said that he wanted it "up and rolling quickly" and that the increasing rumours of union organizing may have speeded it up a little bit. While the hearing in these matters was ongoing, Laporte issued the following notice to employees concerning the operation of the committee:

May 6, 1988

NOTICE TO EMPLOYEES

Due to the recent application for certification, please take notice that management representatives will discontinue meeting with the Employee Plant Committee until the Labour Board matters are concluded.

I am aware that the need to communicate is still required and anyone who requires attention regarding concerns should follow the following procedures:

FIRST STEP: Discuss with your Supervisor.

STEP TWO: If discussion is not desirable with your Supervisor for whatever reason or you do not consider the response from Step One adequate - contact any Supervisor to arrange a meeting with your Supervisor and myself.

I feel by following these easy steps good communication can be maintained.

Thank you.

M.J. LAPORTE,
General Manager

17. Counsel for the UAW argued that Kuhlman's creation of and support for the in-plant committee as detailed above constitutes a contravention of section 64 of the Act. Counsel for Kuhlman and counsel for the objecting employees dispute this allegation and argue that Laporte was not reacting to the UAW's presence by establishing the in-plant committee. Rather, they submit that the committee was simply an extension of Laporte's and Kuhlman's philosophy of establishing sound communication links between the employees and management. The Board was referred to a number of decisions which deal with the Board's response to employee associations or committees, including *Homeware Industries Limited*, [1981] OLRB Rep. Feb. 164, *Primo Importing and Distributing Co. Ltd.*, [1983] OLRB Rep. June 959, *Seven-Up/Pure Springs Ottawa*, [1984] OLRB Rep. Jan. 87 and *Elgin Handles Limited*, [1987] OLRB Rep. Apr. 496.

18. In order to avoid problems with employees and to meet his objective of remaining non-union, Laporte initiated a number of methods to establish communication links with employees. By means of newsletters, surveys, meetings with employees and one-on-one contact with employees on the plant floor, Laporte and management generally attempted to inform and discover the concerns of the workforce. The professional survey did reveal that there was a communication problem to some degree. However, the Board is satisfied that Laporte established and supported the in-plant committee primarily for the purpose of drawing employee support away from the UAW and directing it towards the in-plant committee. Laporte's desire to hold the meetings of the committee as soon as possible given the UAW's presence clearly indicates that the union's presence was an important factor as well when he decided to initiate the committee. It is not simply coincidence, in our view, that Laporte made attempts to establish the in-plant committee a very short time after January 26, 1988 when he acquired knowledge of the UAW's organizing drive. The Board finds that Laporte's conduct related to the in-plant committee as set out above constitutes an intentional interference with the employees' selection of a trade union as their bargaining agent, contrary to section 64 of the Act. Further references will be made to the in-plant committee when we address the meetings of employees that occurred on March 17 and 21, 1988.

MEETINGS OF MARCH 17 & 21

19. Laporte received notice of the UAW's application from the Registrar of the Board on March 17, 1988. He considered the matter for an hour and decided to hold a meeting with the employees. On March 17, 1988, Laporte actually had three meetings with employees at different times in order to catch the employees working on all three shifts. During these meetings, each of which lasted approximately an hour, production was virtually shut down. Laporte also decided to have another meeting with the plant employees on March 21. The employees on the afternoon and night shift were called and directed to report to work on the day shift and no production took place

on March 21. The meeting on the 21st was held in the cafeteria on the second floor where Laporte's office is located, commenced at 9:00 a.m. and finished at 11:45 a.m. When his portion of the meeting concluded, Laporte advised the employees that Horan wished to speak to them and Horan then held a meeting with the employees. During that portion of the time Horan met with the employees, Laporte was called in to address a couple of matters.

20. There is a conflict in the evidence regarding what Laporte said to the employees at the meetings of March 17 and 21. Almost all of the witnesses were asked what Laporte said at the meetings and their recollections varied considerably. Even the employee witnesses called by the UAW were not entirely consistent in the evidence they gave with respect to what Laporte said at the meetings. We have examined this evidence carefully. As a general comment, we found the evidence of Laporte not to be entirely reliable. In response to a number of questions dealing with some significant allegations, he often responded by saying he could not recall. For instance, it was the position of the UAW, which is supported by the evidence, that Laporte said a number of times at the March 17 meeting that he had been "stabbed in the back" and made motions as if he were removing a knife from his back. When asked about this conduct, Laporte testified that he could not recall saying such a thing or making such motions. In our view, given the dramatic nature of the conduct, it is unlikely one would have no recollection as to whether one acted in such a way or not. Of the employee witnesses, the Board was particularly impressed by Barnes and Pardo since they gave their evidence in a straightforward manner. Although we may not accept some of their recollections given all of the evidence, we found them generally to be credible witnesses.

21. Laporte testified that he called the meetings because he wanted to discover what concerns the employees had. He indicated that it was obvious to him that they must have had some concerns since a number of them supported a trade union. He testified that he wanted to get as much feedback as he could from the employees and he wanted to answer questions regarding their concerns. We do not propose to detail the evidence relating to all of the discussion during the meetings. The Board has reviewed the UAW's allegations relating to the meetings in the context of all the evidence and particularly that evidence concerning what occurred at the meetings.

22. At both the day shift and afternoon shift meetings on March 17, Laporte frequently asked the employees why they wanted a union. Laporte testified that he perceived the UAW's application as a personal attack. On a number of occasions, Laporte said he had been "stabbed in the back" and he motioned as if he were pulling a knife out of his back. Although he told employees that he was not against unions and the choice was theirs to make, Laporte expressed the view that the employees did not need a union and that there were other options available to them including the in-plant committee. When employees seemed reluctant to participate in the day shift meeting, Laporte advised them that he knew which employees had attended union meetings and who had signed cards. He testified that he said this to employees to convince them that speaking up would not disclose anything to him that he did not already know. The UAW alleged that Laporte made some veiled threats relating to job security during the meetings. In particular, it was alleged that Laporte advised employees that the presence of a union would affect the policy of no lay-offs unless absolutely necessary and might affect Kuhlman's plans to manufacture the EFI tank at Blenheim. After reviewing all of the evidence related to this issue, the Board has concluded that the UAW's allegations concerning threats to job security made by Laporte are not supported by the evidence.

23. During the meeting on March 21, 1988, Laporte again asked employees what problems they had. Again there was discussion on a number of issues, most of which were raised by employees. As noted earlier, Horan began to address the employees at approximately 11:45 a.m. in the absence of Laporte. The meeting was interrupted by lunch but resumed once lunch was completed.

Two matters were raised by the employees which Horan and the employees felt should be addressed by Laporte. When Laporte returned to the cafeteria, he was asked if the employees could elect another in-plant committee since some felt the first election was not taken seriously. Laporte responded by saying "yes". Laporte was then asked whether Kuhlman would pay the legal costs of the committee if it incurred any, particularly in an arbitration context. Laporte testified that he responded to this question by saying he did not know why the company would not look at it. The employee witnesses again had different recollections of what Laporte said when he answered this question. In reviewing the evidence on this issue, the Board is satisfied that Laporte told the employees that Kuhlman would pay those legal costs since it would have to pay for its own lawyer anyway.

24. Counsel for Kuhlman argued that the holding of the meetings and anything Laporte said at them did not contravene the Act. It was submitted that the holding of the meetings was consistent with Laporte's management style and philosophy in that if the employees had problems he wanted to discover what they were and deal with them. Counsel argued again that the meetings and Laporte's comments were not reactions to the UAW but rather an attempt by Laporte to deal with employee concerns. Counsel noted that Kuhlman had a practice of holding meetings with employees and had developed other communication techniques and that one must view the meetings of March 17 and 21 in the context of this history.

25. In the Board's view, the meetings which occurred on March 17 and 21 were different from the kind of meetings the employees had previously experienced. The previous meetings which we heard specific evidence about were held at a time so as to avoid the necessity of stopping production. The meetings on March 17 and 21 were held at times and for a duration which required production to stop. For the meeting on March 21, production ceased for an entire work day. It is difficult to conclude from a review of the evidence that the holding of the meetings and what Laporte said at them was anything but a reaction to the UAW's application. The meetings on March 17 were held very shortly after Laporte received notice of the UAW application. The motion of removing a knife from his back and the comments Laporte made during the meetings make it quite clear that the meetings were held, and the employees believed they were held, because of the prospect of unionization at Kuhlman's Blenheim plant.

26. The Board finds that Kuhlman contravened section 64 of the Act when Laporte expressed the view at the March 17 meetings that the employees could deal with the in-plant committee and at the March 21 meeting when he said that Kuhlman would pay certain legal costs which the in-plant committee would incur. As noted earlier, the role Laporte played in establishing the in-plant committee and his support for it contravened section 64 of the Act. The references to the committee at the meetings of March 17 and 21 is further evidence of Kuhlman's support of the committee in the face of the UAW's organizing drive and application. The Board has held on a number of occasions that an employer does not contravene the Act by simply expressing a preference that its employees remain non-union. Laporte's comments at the meetings went beyond the mere expression of such a view, and constitute interference with the UAW within the meaning of section 64 of the Act.

27. It is often the case that when faced with an allegation that section 64 has been breached, the Board must balance the rights of employees to organize without being subject to the prohibitions specifically set out in section 64 and the right of an employer to express its views. In performing this balancing function, the Board recognizes that employees can be particularly vulnerable to employer influence. This point is made in the following comments in *Taggart Services Limited* (1964), CLLR Transfer Binder '64-'66, ¶16,015 at page 13,055:

An employer may express his views and give facts in appropriate manner and circumstances on

the issues involved in representation proceedings insofar as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However, he should bear in mind in so doing the force and weight which such expressions of views may have upon the minds of his employees and which derive from the nature and extent of his authority as employer over his employees with respect to their wages, working conditions and continuity of employment. He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of intimidation, threats, or other means of coercion to interfere with their freedom to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.

28. In balancing the interests referred to above in the circumstances of this case, the Board finds that Kuhlman contravened section 64 of the Act when Laporte solicited the concerns of employees at the meetings of March 17 and 21, when on March 17 Laporte told employees he had been “stabbed in the back” and made motions as if he were removing a knife from his back and when he advised employees that he knew who signed membership cards for the UAW. One of the primary reasons for having the meetings was to solicit and discuss the concerns of the employees. Implicit in such conduct during the course of a union organizing campaign is that the employer is prepared to satisfy the concerns of employees thereby making union representation unnecessary. (See, *The Globe and Mail Division of Canadian Newspaper Company Limited*, [1982] OLRB Rep. Feb. 189.) The message Laporte intended to send to the employees is that Kuhlman is prepared to meet their concerns and that the presence of the union is not required. The Board’s assessment of why the meetings were held is similar to the assessment of J. Thorpe, one of the objecting employees, who testified that Laporte was interested in what was going on and what could be done to please the employees. Telling employees he had been “stabbed in the back” and the motion of removing a knife from his back, as well as telling employees that he knew who signed cards constitute undue influence within the meaning of section 64. Given the sensitive nature of the employer-employee relationship, Laporte crossed the line of free expression by sending a message to employees that by exercising their rights under the Act, the employees who joined the UAW were stabbing him in the back. This was particularly the case when Laporte told employees that he knew who the union supporters were. This latter statement, even given its context, has the potential to affect an employee’s decision to support or to continue to support the UAW, and we are satisfied that the statement was intended in part to have this effect. Employees are likely to be reluctant to support a trade union or to continue to support one if they know that their employer, the entity which determines their working conditions and whether they will continue working, is aware of who signed and who did not sign a membership card.

PETITIONS

29. Horan, the chairperson of the in-plant committee, was the employee primarily responsible for the origination and circulation of the petitions. Prior to the UAW filing its application, he had discussed the possibility of opposing the UAW with a limited number of employees. Horan was assisted in his efforts to circulate the petitions by P. Knight, also a member of the in-plant committee and J. Thorpe. Since the voluntariness of the petitions is not a central issue before us, we do not propose to detail the evidence relating to its preparation and circulation. Horan read the notice of the application and the Notice to Employees shortly after they were posted. Near the end of the meeting held for the day shift on March 17, Horan stood up and asked Laporte if it was possible for the employees to circulate a petition. Laporte responded by simply directing Horan to read the Notice to Employees. On the evening of March 17, Horan drafted the first petition at home and the document was circulated at the plant beginning on March 18. On March 21, just prior to the start of the meeting, Horan approached Laporte and asked him if he could have some time with the employees. Both Laporte and Horan testified that Laporte said “yes” without asking Horan why he wanted some time with the employees. In his evidence, Laporte indicated that he gave his permission since Horan was chairperson of the in-plant committee.

30. When Laporte concluded his portion of the March 21 meeting, he advised employees that Horan wished to speak to them and left the cafeteria. Horan wanted some discussion to develop, which it did, regarding the pros and cons of unionization. From Horan's comments, it was clear to the employees that he opposed the UAW and wanted the employees to support the in-plant committee. After Laporte returned to answer the two questions referred to earlier and left the cafeteria, further discussion between the employees took place and an employee raised the matter of the petition. After some discussion, a procedure was devised with regard to the signing of the document. Horan, Knight and Thorpe went into a training room located near and visible from the cafeteria. Each employee had the opportunity to enter the training room and when inside could elect to sign or not to sign the petition. While this process was underway, Laporte attempted to enter the training room but was denied access by Horan and left. Once every plant employee had the opportunity to enter the training room, Horan advised the employees that they could go to work. Given the hour, the employees did not return to work and in a short while left for the day.

31. On March 22, Horan asked Laporte if he knew any lawyers Horan could contact. Laporte said he did not but that he was meeting with his lawyer that afternoon and he would make some inquiries and get back to him. Later that day, Laporte provided Horan with a list of names of lawyers and said that was the best he could do. After obtaining some legal advice, Horan prepared a second petition since he felt that the first petition might not be valid as a result of the way in which the signatures were obtained. The signatures on the second petition were obtained while employees were outside the Kuhlman plant and it is this second petition that was filed with the Board prior to the terminal date. The Board notes as well that shortly after the meeting of March 22, the employees again elected five employees to be on the in-plant committee.

32. The Board agrees with the position advanced by counsel for the UAW that Kuhlman supported the circulation of the petition. We are satisfied that Laporte was aware of Horan's role in sponsoring the petition. Horan specifically asked Laporte about a petition at the end of the March 17 meeting. Given the timing of the meetings, it is difficult to accept that Laporte did not realize that Horan wished to speak to employees concerning his opposition to the UAW when Horan approached him about addressing the employees on March 21. Given what we find to be most probable in the circumstances, the Board finds that Laporte permitted Horan to use Kuhlman's premises during a period of time when employees would usually be working in order to express opposition to the UAW. By permitting this, Kuhlman supported the petition activity and thereby contravened section 64 of the Act. We also find that Kuhlman contravened section 64 of the Act when Laporte assisted Horan by providing him with the names of certain lawyers.

SUPERVISORS' STATEMENTS

33. S. Singh, who gave notice to leave on March 30, 1988 and worked his last day for Kuhlman on April 15, 1988 was one of Kuhlman's supervisors and E. Kluka was also a supervisor during the relevant time. Laporte testified that he met with all members of management on March 18, 1988 and told them they were not allowed to discuss matters relating to the union with employees. The UAW has alleged that both Singh and Kluka made statements to certain employees which constitute contraventions of the Act. In determining whether Kuhlman contravened the Act, having regard to the discussions between Singh and Kluka and certain employees, the Board has reviewed the evidence concerning the discussions and in particular, the context of those discussions. On April 7, 1988, Singh had separate discussions with Barnes and Pardo, the substance of which we find unnecessary to detail. Having regard to the nature of the comments, the fact that the employees were aware that Singh was leaving Kuhlman and the evidence of Barnes and Pardo to the effect that they understood Singh was merely giving them some friendly advice, the Board finds that the brief statements by Singh to Pardo and Barnes do not constitute contraventions of the Act.

On March 23, Riha asked Kluka what he thought about the union situation and Kluka responded by saying that there would be no expansion of the plant if the union came in. Kluka testified he could not recall such a conversation with Riha. Although Riha indicated in cross-examination that he did not believe Kluka was speaking on behalf of Kuhlman when he made the comment, the Board cannot ignore the fact that Kluka is part of management and the substance of the statement Kluka made. Kluka also had a discussion with Barnes. Barnes asked Kluka if he had heard a rumour about Kuhlman building a warehouse. Kluka responded by saying that if the union came in he did not believe Kuhlman would be building anything. Barnes told some of the employees about this conversation with Kluka. The Board is satisfied that the statements made by Kluka to Riha and Barnes constitute contraventions of sections 64, 66 and 70 of the Act.

THE RIHA LAY-OFF

34. On April 4, 1988, Kuhlman laid off two junior employees, namely K. Riha and S. Brown. Riha started with Kuhlman on March 9 and S. Brown had a start date of March 10, 1988. On April 7, Brown was recalled to work for two midnight shifts beginning on April 7 at 12:00 a.m. and then laid off again. Both Brown and Riha were recalled to work on April 14, 1988. The UAW does not allege that the initial lay-off of the two employees contravened the Act. It does complain, however, that by not recalling Riha, Kuhlman contravened the Act.

35. Laporte testified that Kuhlman did follow a practice of first recalling the most senior person on lay-off. Laporte also testified that he had a strong suspicion that Brown was a UAW supporter. Laporte testified that he did attempt to call Riha but was unable to contact him. He then gave instructions to recall Brown. It is clear from the evidence Laporte gave that B. Dye, the personnel administrator, had been involved in decisions relating to the lay-off and recall. Riha testified that he talked to Laporte by phone on April 6, 1988, the same day Brown was being recalled, and asked him how long he would be laid off. Riha testified that Laporte told him the lay-off was indefinite. When Riha asked Laporte on the first day of hearing in Toronto why Brown was recalled and not him, Laporte told him to talk to Dye.

36. Section 89(5) is applicable to this allegation. In *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board addressed the effect of the section 89(5) reversal of the onus of proof as follows:

Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

37. On the evidence before us concerning the recall of Brown rather than Riha, the Board cannot be satisfied with Laporte's explanation for not recalling Riha. The Board accepts Riha's evidence that he spoke with Laporte on April 6 and that Laporte said his lay-off was indefinite. It is difficult to understand, given the absence of any explanation, why Riha was not recalled when it was on that very evening that Brown was scheduled to work. In giving his evidence, Laporte was unsure of the date that Brown was called into work and did not know what day he spoke to Riha. In these circumstances, the Board finds that Kuhlman contravened sections 66 and 70 of the Act when it recalled Brown for two shifts instead of Riha. Accordingly, the Board directs Kuhlman to compensate Riha for his losses arising out of this contravention of the Act.

38. In summary, the Board has determined that Kuhlman committed a number of unfair labour practices subsequent to Laporte gaining knowledge of the UAW's organizing campaign. Kuhlman contravened the Act when:

- (1) Laporte announced on February 4, 1988 that certain benefits would be implemented, and subsequently implemented those benefits;
- (2) Laporte encouraged and supported the formation of an in-plant committee, particularly as evidenced by his comments concerning the committee during the meetings of March 17 and 21, 1988;
- (3) Laporte held the "captive audience" meetings on March 17 and 21 and conducted himself at those meetings in the manner described above;
- (4) Laporte supported the objecting employees in their efforts to oppose the UAW's application;
- (5) E. Kluka, a supervisor, made the aforementioned statements to two employees, and
- (6) Brown was recalled to work for two days instead of Riha.

We now turn to the issue of whether the above contraventions have resulted in a situation in which the wishes of the employees are not likely to be ascertained in a vote.

39. Since the effect of granting section 8 relief is considerable, the Board has recognized that it is appropriate to take a cautious approach when faced with a request for such relief. This approach is reflected in the comments made in the following paragraphs from *Trulite Industries Limited*, [1983] OLRB Rep. May 821:

24. The competing policy considerations which underlie section 8, are aptly set out by the British Columbia Labour Relations Board in commenting on a similar provision in its own statute. In *International Brotherhood of Boilermakers, Lodge 359 and Forano Limited* (1974) Can. L.R.B.R. 13, the Board observed at page 20:

... Certification without a vote ... creates a real disincentive to the use of [intimidatory] kinds of tactics. It does so by depriving the offer of the fruits of its unlawful conduct ... However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of choice about collective bargaining. Accordingly, the remedy is to be used where one cannot feasibly determine the true wishes of the employees through the normal means ... I think everyone is aware of the risks involved in that kind of certification. In some cases, the employees may have foisted upon them a bargaining representative which they really don't want. Undoubtedly, the remedy must be carefully used...

25. As the above comments indicate, the wishes of the employees are always the Board's primary concern, and the remedy is not meant to be punitive; moreover, where support is not really there, the Board would not be placing the union in an enviable position by granting a certificate. Without the support of the employees the union would have a difficult time negotiating a collective agreement, and it would ultimately face the prospect of a termination application. On the other hand, the Board must not hesitate to consider the provisions of section 8 when it is the employer's own misconduct that impairs the Board's ability to ascertain with more certainty what the wishes of the employees really are. As the British Columbia Board went on to say:

... The Board must not be afraid to use it [the certification remedy] when it appears appropriate. The Legislature conferred it for the very good reason that there is another equally serious risk to employee freedom. The majority in a unit may really

want collective bargaining but have been intimidated from choosing it openly. The only way they will get it, is for the Board to certify the union ...

40. As the Board has noted in its decisions, not every violation of the Act by an employer prevents employees from expressing their true wishes. In each case, the Board has regard to all of the circumstances before it when it assesses, as a factual matter, whether the true wishes of employees are not likely to be ascertained. In this exercise, the Board considers whether the contraventions of the Act may be remedied in such a way so as to create a situation in which a vote would likely reveal the true wishes of employees. In *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189, the Board reviews some of the factors which have influenced its determination:

The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he has been told by his employer, either expressly or impliedly, and has reason to believe, that the selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in the number of jobs. (See *Dylex Limited*, *supra*, *Lorain Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734, *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338, *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801, *Sommerville Belkin Industries Limited*, [1980] OLRB Rep. May 79] and *A. Stork and Sons Ltd.*, [1981] OLRB Rep. April 419.)

The Board has also applied the section where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice. In these circumstances the Board is forced to the inevitable conclusion that the true wishes of the employees are not likely to be ascertained. (See *Radio Shack*, *supra*, *K-Mart*, *supra*, *Skyline Hotel Limited*, *supra* and *Robin Hood Multi Foods* [1981] OLRB Rep. July 972.)

41. Counsel for the UAW argued that any one of the contraventions of the Act by itself would not necessarily lead to the granting of the relief requested but that given the number of contraventions and their nature, the Board should certify the UAW pursuant to section 8. Counsel for Kuhlman and counsel for the objecting employees both took the position that even if the Board were to find that Kuhlman contravened the Act, this was not a case in which it should conclude that a vote would not reveal the true wishes of the employees, particularly given the remedies the Board could devise to deal with the unfair labour practices.

42. As we noted earlier, the Board reviews all of the facts when making an assessment as to whether the third pre-condition for granting section 8 relief has been satisfied. Although we have found it convenient to deal with each of the UAW's allegations and the relevant evidence relating thereto separately, the events which constitute contraventions of the Act are, for the most part, very much interrelated. We note that Laporte's role in forming and his support for the in-plant committee have a relationship to what Laporte said at the meetings of March 17 and 21 and to Laporte's support of the objecting employees who attempted to convince employees to reject the UAW in favour of the in-plant committee and who were led by two in-plant committee members, including the chairperson of that committee. The relationship of these events which constitute contraventions of the Act would undoubtedly have a significant impact on employees.

43. In cases such as *Homeware Industries Limited*, *supra*, and *Primo Importing and Distributing Co. Ltd.*, *supra*, the Board found that employer involvement in establishing an employee organization and support for such an organization did not lead it to conclude that the true wishes

could not be revealed in a vote. However, the number of contraventions of the Act the Board was dealing with in those cases was very limited, with the main contravention relating to the employer's conduct concerning an internal employee entity. In addition to the role Kuhlman played with respect to the in-plant committee, it also contravened the Act in a number of other significant ways. And even with respect to its conduct relating to the in-plant committee, the Board finds that Laporte's indication to employees that Kuhlman would pay some of the legal expenses incurred by the in-plant committee is an important factor which was not present in other cases. If the Board were to order a vote in this case, we would in effect be asking employees to decide whether they supported the UAW or whether they supported an in-plant committee favoured by their employer (which in itself would come as no surprise to employees) which their employer is prepared to finance to a certain extent. This latter element would likely have a significant impact on the typical employee. But combined with this element, employees would be asked whether they wanted the UAW as their bargaining agent after Laporte contravened the Act by announcing and subsequently providing certain benefits, after Laporte contravened section 64 of the Act by holding the aforementioned meetings of March 17 and 21, after Laporte supported the objecting employees' efforts to turn the employees away from the UAW, after Kluka made the unlawful statements to two employees and after Kuhlman contravened the Act in not recalling Riha. The impact on the true wishes of employees of each of these contraventions is not identical. But when we consider the cumulative effect of all Kuhlman's contraventions of the Act, the Board is satisfied that in the circumstances of this case Kuhlman has created a situation in which the wishes of the employees are not likely to be ascertained in a vote. In this regard, the Board notes that the number of employees in the bargaining unit is not large and that Laporte, the person responsible for a majority of the contraventions of the Act, has a history of maintaining a one-on-one contact with employees.

44. The Board is satisfied that the remedies it could grant under section 89 would not restore the atmosphere existing prior to Kuhlman's illegal conduct so that employees would be able to freely choose whether they wish to be represented by the UAW or not. With the three pre-conditions to section 8 having been met and given the particular circumstances of this case, the Board finds that this is an appropriate case in which to exercise its discretion to grant the UAW section 8 relief. Accordingly, a certificate will issue to the applicant for the bargaining unit described in paragraph 2 of this decision.

45. The Board has found the respondent to have contravened sections 64, 66 and 70 of the Act. Consequently, the Board orders:

- (a) that Kuhlman sign and post copies of the attached Notice marked "Appendix", as supplied by the Board, in conspicuous places on its premises and to keep such notices posted for sixty (60) working days and to take all reasonable steps to ensure that the Notices are not altered or defaced or covered by any other material;
- (b) that Kuhlman provide reasonable access to a representative of the applicant to permit the applicant to satisfy itself that Kuhlman has complied with this posting order;
- (c) that Kuhlman give two representatives of the applicant an opportunity to hold one meeting per shift, which will occur within the two weeks of the receipt of this decision or a time satisfactory to the applicant, with all employees, without loss of pay, on Kuhlman's premises during working hours but without the presence of any member of management. Each of these meetings may be as much as

one hour in length. Kuhlman is further directed to require all employees to attend such meetings;

- (d) that Kuhlman compensate K. Riha for his losses arising out of its failure to recall him for two shifts.

46. The Board shall remain seized to resolve any dispute as to the implementation of these orders.

DECISION OF BOARD MEMBER J. W. MURRAY;

1. I agree substantially with the statement of facts set forth above but I cannot come to precisely the same conclusions as the majority.

2. The Board's power under section 8 to grant certification without a vote, depends on three conditions being met, one of which is that a vote would be unlikely to ascertain the wishes of the employees. I am not persuaded this would be the case on the basis of the evidence.

3. There is little doubt that the employer would prefer not to have a union and may even prefer an employee association of some style. This is not uncommon. However of great significance would have been some threats, coercion or other actions or statements which might imply loss of employment. There does not appear to me to be significant evidence of any such situation in this case.

4. The only evidence was a remark attributed to E. Kluka, a supervisor, concerning the future of this new plant. Evidence showed that Riha (to whom the remark was supposedly addressed) did not believe that Kluka represented management thinking and would be unlikely to be knowledgeable of company policy. Barnes said he passed on to a few others some interpretation of what he felt Kluka implied. In the overall, it did not seem to be an important factor.

5. In the final analysis, it seems to me there was insufficient employer interference to cause a reasonable employee, thinking in a reasonable manner, to be unable to express his real wishes in a representation vote. I would have had appropriate notices posted in the plant, given the union representatives an opportunity to speak to employees on each shift and then ordered a vote, which would let the employees express their true wishes.

Appendix
Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY, THE UNION AND THE OBJECTING EMPLOYEES HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT LAYOFF, DISCHARGE OR THREATEN TO LAY OFF OR DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITIES OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL PROVIDE REPRESENTATIVES OF INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ACCESS TO OUR PREMISES DURING WORKING HOURS FOR THE PURPOSE OF CONDUCTING ONE MEETING PER SHIFT OF THE EMPLOYEES IN THE BARGAINING UNIT OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT.

KUHLMAN PLASTICS OF CANADA LTD.

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 19th day of December , 19 88 .

3339-87-R; 3530-87-U International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Applicant v. **Kuhlman Plastics of Canada Ltd.**, Respondent v. Group of Employees, Objectors; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Complainant v. Kuhlman Plastics of Canada Ltd., Respondent

Bargaining Unit - Certification Where Act Contravened - Practice and Procedure - Respondent arguing that part-time employees and students should be excluded from the unit - Respondent not having a history of employing such persons but plant only in operation a short time - Board not departing from its approach of including such persons in unit - Applicant objecting to the officer disclosing the count - Disclosure ordered - Count particularly important where s.8 relief requested

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. A. Correll* and *M. Jones*.

APPEARANCES: *S. B. D. Wahl*, *D. V. Caryn* and *B. DeWagner* for the applicant/complainant; *Steve Schenke*, *Mike Laporte* and *Edward Klopfenstein* for the respondent; *John H. McNair* and *Brad Horan* for the objectors.

DECISION OF THE BOARD; December 19, 1988

1. The name of the respondent is amended to read: "Kuhlman Plastics of Canada Ltd."
2. Board File No. 3339-87-R is an application for certification. Board File No. 3530-87-U is a complaint under section 89 of the *Labour Relations Act* alleging violations of sections 64, 66, 70 and 79 of the Act. The applicant has also requested the Board to certify it pursuant to section 8 of the Act. On the agreement of the parties, these matters are hereby consolidated.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. On the first scheduled day of hearing, the parties met with a Labour Relations Officer. Since they were unable to agree on a bargaining unit description, the Board entertained representations from the parties concerning the two bargaining unit description issues that were unresolved. The respondent sought the exclusion of part-time employees and students employed during the school vacation period. The applicant opposed such an exclusion and the objecting employees did not take a position on this issue. At the time of the filing of the application, the respondent employed one laboratory technician and four persons performing quality control functions. The parties agreed that the laboratory technician should be excluded from the bargaining unit but were unable to reach agreement with respect to those persons performing the quality control functions. The applicant sought the exclusion of the quality control employees while both the respondent and the objecting employees argued that they should be included in the bargaining unit. On the basis of the statement of facts made by each party and their representations and after recessing to consider the matters, the Board orally ruled at the hearing that it would not exclude part-time employees and students from the bargaining unit and that it would include in the bargaining unit the quality control employees.
5. When the application was filed, the respondent did not employ part-time employees or students employed during the school vacation period and did not have a history of employing either category of employee. When the issue was argued, the respondent did not anticipate hiring

part-time employees and had not determined whether it would hire students during the summer months. The employer's business has only been in operation since October 1987, approximately five months prior to this application, and the respondent argued that the requirement in the Board's practice that it have a history of employing part-time employees and students should not apply in this case given the short time the plant has been open.

6. Generally, the Board's practice is not to exclude part-time employees and students from a plant bargaining unit where no such persons are employed on the date of the application and where the employer does not have a history of employing such persons. We were satisfied that the fact that the respondent's plant has been in operation for only a few months should not lead us to depart from the Board's normal practice. The following statement of policy in *Canadian Pittsburgh Industries Limited*, [1968] OLRB Rep. July 367 reflects the Board's longstanding approach concerning the exclusion of students and part-time employees where an employer has been in operation for only a short period of time:

The fact that a plant has been in operation a short time and has not yet reached the stage of development or the period of the year when it is likely to employ part-time employees or students is not in itself a sufficient consideration to warrant a departure from the general principle that such classifications are to be included in a bargaining unit where the employer has not had persons in such classifications in his employ prior to or at the time of the application.

7. The respondent manufactures fuel tanks which it supplies primarily to the auto industry. Given the nature of the product, all employees are involved in maintaining high safety standards. The persons employed to perform the quality control functions monitor the quality of the product as it passes through the production process. They spend seventy-five per cent of their time performing tests on the plant floor and the remaining time performing tests in the lab. The persons in quality control learn their tasks on the plant floor, are generally recruited from the production employees and are paid on the same basis as production employees. When a quality control employee discovers a defect in a product, he or she completes a report that could be the basis for the imposition of discipline. The quality control employee would not be part of the decision-making process regarding discipline. We do not propose to detail the work or the terms of employment of the lab technician other than to note that the person in the position is a chemist by training, performs testing in the lab which is of a different nature than that performed by the quality control employees and is paid more than the quality control employees. After comparing the work and the terms and conditions of the quality control employees, the production employees and the lab technician, the Board was satisfied that the quality control employees have a community of interest with the production employees and, therefore, should be included in the bargaining unit.

8. After the Board gave its oral rulings concerning the bargaining unit issues, it suggested that the parties continue to meet with the Board Officer to draft the appropriate language. Given the partial agreement of the parties and the Board rulings, the Board finds that all employees of the respondent at Blenheim, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. For purposes of clarity, the parties agree that students who work in the plant on a co-operative grant scheme, administered by government, who are not paid salary or wages by the respondent, are not employees of the respondent for purposes of this application.

10. During the meeting with the Board Officer, the applicant objected to the Board Officer disclosing the number of membership cards filed in support of the application (the "count"). The Board reconvened the hearing and entertained the applicant's reasons for not wanting the count

disclosed. Counsel for the applicant argued that the disclosure of the count would have an adverse effect on how the parties would conduct the case. It was submitted that the parties would be more likely to become intransigent and less likely to resolve outstanding issues if the count was disclosed. In counsel's view, such a result was not in the interests of sound labour relations. Without hearing from the other parties, the Board ruled orally at the hearing that the Board Officer would disclose the count. Generally, it is the Board's practice to disclose the count after the parties have reached agreement as to which persons were employed in the bargaining unit on the date of the application. The count is given in order that parties, in addition to the applicant, will be aware of the membership support enjoyed by the applicant. It is important that all parties be aware of the nature of the case they have before them. This is particularly so when section 8 is relied on since one of the pre-conditions for section 8 relief is whether the applicant has adequate support for collective bargaining. In this case, the disclosure of the count revealed that the applicant was in a vote position.

11. Since the matter could not be completed on the first day of hearing, the application as it related to the section 8 issue was heard subsequently at London by a new panel but with the same Chair. Before completing the first day of hearing, the Board entertained representations from the parties concerning the order of calling evidence. After the respondent heard the applicant's submissions on this issue, it agreed that it would proceed to call its evidence first. Counsel for the objecting employees argued that the applicant should follow the respondent and that the objecting employees would then call their evidence. Given the similarity of interest and what would be most appropriate in the circumstances, the Board orally ruled at the hearing that the respondent would proceed to call its evidence first, the objecting employees would follow the respondent and the applicant would then call its evidence.

3343-87-G Ontario Sheet Metal Workers' and Roofers' Conference, Applicant v. Ontario Hydro, Electrical Power Systems Construction Association, Respondents

Construction Industry Grievance - Damages - Remedies - Grievance alleging that respondent violated collective agreement by not convening a mark-up meeting before assigning the work of installing pipe - Board dismissing argument that this was a work assignment dispute - Respondent violating collective agreement - Board awarding damages for losses caused by the failure to hold the mark-up meeting but denying prospective mandatory order

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *D. A. MacDonald* and *E. G. Theobald*.

APPEARANCES: *S.B.D. Wahl*, *G. Ward* and *P. Budway* for the applicant; *Robert J. Atkinson* and *Sheila Goldsworthy* for the respondents; *A. J. Ahee*, *Neil Meikle* and *Chris Burrows* for United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463.

DECISION OF THE BOARD; December 12, 1988

1. The Ontario Sheet Metal Workers Conference, hereafter referred to as the Union, and the Electrical Power Systems Construction Association, hereafter referred to as EPSCA, are parties to a collective agreement by which Ontario Hydro and the various local unions of the applicant

are bound. The Union filed a grievance against Ontario Hydro and EPSCA alleging that Ontario Hydro violated several provisions of that collective agreement by the manner in which it ultimately assigned members of the United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, hereafter referred to as the U.A., to fabricate and install 6" carbon steel schedule 40 pipe. The grievance arose because that pipe carries deuterium oxide (D_2O) vapour or heavy water vapour from the moderator resin deuteration and de-deuteration system and the primary heat transport resin deuteration and de-deuteration system to the D_2O vapour recovery system in the nuclear reactor auxiliary bay at the Darlington Generating Station. The applicant referred that grievance to arbitration before the Board under section 124 of the Act without objection from the respondents as to the applicant's status to do so.

2. The moderator resin deuteration and de-deuteration system and the primary heat transport deuteration and de-deuteration system remove impurities from the heavy water circulating in the nuclear reactor through the use of resins. The resins are infused with heavy water (deuteration) to purify the heavy water. Once the resins collect impurities from the heavy water, the resins are cleansed with water and the heavy water is removed (de-deuteration). The deuteration and de-deuteration (deut./de-deut.) systems permit sampling of the resins. During the sampling process, heavy water vapour may escape from the deut./de-deut. systems. Fume hoods and sampling cabinets, which are part of those systems, are used to collect heavy water vapour that does escape.

3. The D_2O vapour recovery system is also a distinct system installed in the nuclear reactor auxiliary bay to collect D_2O vapour. The D_2O vapour recovery system is an air handling system while the deut./de-deut. systems are principally mechanical systems which carry liquid. The D_2O system and the deut./de-deut. systems are connected by 6" carbon steel schedule 40 pipe that carries D_2O vapour from the fume hoods and sampling cabinets in the deut./de-deut. systems to the D_2O vapour recovery system.

4. Ontario Hydro sub-contracted the construction of the D_2O vapour recovery system to E.S. Fox Limited, a sub-contractor who was also bound by the collective agreement between EPSCA and the Union. Pursuant to that collective agreement, E.S. Fox convened a mark-up meeting with representatives of the various trades affected by the work and representatives of Ontario Hydro and EPSCA. Subsequent to that meeting, E.S. Fox assigned the following work on the D_2O vapour recovery system to members of the Union:

“... the fabrication and installation of ducting fabricated up to 30" carbon steel, Schedule 40 piping, and installation of skid-mounted heaters and fans. The systems involved carry low pressure air and circulate air to and from the containment and confinement areas.”

5. Grant M. Howard, an Ontario Hydro supervisor of field engineers at Darlington, was responsible for the administration of Ontario Hydro's contract with E.S. Fox for the construction of the D_2O vapour recovery system. Mr. Howard carefully explained the interconnection between the D_2O vapour recovery system and the deut./de-deut. systems. He testified that Ontario Hydro's contract with E.S. Fox did not include the fabrication and installation of 6" carbon steel Schedule 40 piping that carried D_2O vapour from the fume hoods and sampling cabinets in the deut./de-deut. systems to the D_2O vapour recovery system. The mark-up meeting convened by E.S. Fox therefore could not have included that particular work on the deut./de-deut. systems because that work was not part of the E.S. Fox contract with Ontario Hydro.

6. J. Robert McCormick, the piping superintendent for Ontario Hydro at Darlington, testified that he supervised the installation of all piping systems done by Ontario Hydro's employees at Darlington. He said that the two deut./de-deut. systems were piping systems each containing approximately 700 meters of pipe. Of that 700 meters of pipe in each system, approximately 55

meters of 6" carbon steel Schedule 40 pipe was used to carry D₂O vapour from each deut./de-deut. system to the D₂O vapour recovery system. That is, approximately eight per cent of each system consisted of piping used to carry D₂O vapour. The balance of the deut./de-deut. systems used stainless steel piping to carry liquid.

7. Mr. McCormick was responsible for assigning the construction of the deut./de-deut. systems piping to members of U.A. He agreed that Ontario Hydro did not hold a mark-up meeting for those two systems. He testified that mark-up meetings are not held for all work that Ontario Hydro does, but that Ontario Hydro only convenes such meetings when the assignment of work to be performed is likely to be contentious between trades or the work to be assigned is new work not done previously.

8. When Mr. McCormick made the assignment of the piping work on the deut./de-deut. systems to members of the U.A., he did not know that those systems also included some pipe carrying D₂O vapour. Mr. McCormick agreed that he knew that there was dispute between the U.A. and the Union over the fabrication and installation of air handling or vapour systems that use piping materials. He did not advise the Union about the small amount of pipe carrying vapour in the deut./de-deut systems because he did not do a detailed review of the drawings of those systems. He assumed those systems were just like other piping systems which were routinely assigned to members of the U.A. to fabricate and install. There was no mark-up meeting over the deut./de-deut. systems because no one at Ontario Hydro decided to convene one. He also pointed out that there was no specific decision by Ontario Hydro not to convene a mark-up meeting in respect of those two systems. He said that there are thousands of piping drawings for hundreds of systems and no one responsible for the assignment of work to the trades realized before the assignment was made that the deut./de-deut. systems included piping carrying vapour and not just piping carrying liquid.

9. When Mr. McCormick learned from the Union that 6" carbon steel Schedule 40 pipe to carry D₂O vapour was being fabricated and installed in connection with the deut./de-deut. systems, he concluded that such work was properly the work of the Union. He thought the work was similar to the work done by E.S. Fox in the same building at floor levels both below and above the place where the deut./de-deut. systems were being installed. Mr. McCormick was going to reassign that work to the Union but was informed by the U.A. that if Ontario Hydro changed the work assignment, the U.A. would hold Ontario Hydro in violation of the rules of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. After receiving further advice from Ontario Hydro's Industrial Relations office, Mr. McCormick did not change the original work assignment. Ontario Hydro subsequently referred the dispute over its work assignment to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry.

10. The arbitrator under the Plan ruled that he had the jurisdiction to make an award of a work assignment, and assigned the work to the Union. After the award issued, the work in question was assigned by Ontario Hydro to members of the Union.

11. Counsel for the applicant argued that the grievance is not a dispute over the assignment of work, but rather is a grievance claiming Ontario Hydro violated the collective agreement by its failure or refusal to hold a mark-up meeting. The applicant seeks a declaration, damages and a prospective mandatory order requiring Ontario Hydro to comply with the collective agreement in the future.

12. Counsel for Ontario Hydro submitted that this grievance is in actuality a work assignment dispute. Counsel argued that the Board has no jurisdiction to deal with the matter but should defer the dispute to the Plan that has already resolved the dispute. Even if there was jurisdiction to deal with the grievance as filed, counsel argued that there was no violation of the collective agree-

ment and in any event, even if the Board found a violation of the collective agreement, the applicant cannot receive damages. He also disputed the applicant's entitlement to a mandatory prospective order.

13. In our opinion, the principal issue in this matter is whether Ontario Hydro violated article 8, and in particular, sections 8.2 and 8.3, of the collective agreement. Those sections provide:

"8.2 Regular mark-up meetings will be conducted for each project ... at times appropriate for the work in progress. The purpose of these mark-up meetings is to indicate to the Unions the work which is about to be carried out by the Employers in order to minimize the potential for jurisdictional disputes.

EPSCA will provide written notice to the Union as far in advance as possible of mark-up meetings.

The Union will attend these mark-up meetings, and every effort will be made to settle questions of jurisdiction before the dates that management indicates the work is expected to commence.

8.3 The Employer who has the responsibility for the installation shall make a proposed assignment of the work involved. The Employer will specify a time limit for the Unions involved to submit evidence of their claims. The Employer will evaluate all evidence submitted as per Article 8.1 and make a final assignment of the work involved. This final assignment will be in accordance with the procedural rules established by the Impartial Jurisdictional Disputes Board. The Employer will advise the Union of the final assignment prior to work commencing. A copy of such assignments shall be submitted to the Business Manager of the Ontario Sheet Metal Workers' Conference."

14. We do not accept that this grievance is in reality a dispute over a work assignment. Mr. McCormick's evidence is quite telling in that regard. Had he been alerted to the fact that pipe carrying vapour was part of the deut./de-deut. systems prior to the assignment of that work to members of the U.A., we believe that he would have assigned that portion of the fabrication and installation work on the deut./de-deut. systems to members of the Union. That work, which was the fabrication and installation of piping to carry D₂O vapour to the D₂O vapour recovery system, was virtually identical to the work that was discussed at the mark-up meeting convened by E.S. Fox among the affected trades to deal with the D₂O vapour recovery system. E. S. Fox assigned that work to the Union. That is, had Ontario Hydro convened a mark-up meeting prior to the assignment of the work done on deut./de-deut. systems, it is highly unlikely that a work assignment dispute would have arisen, or if such a dispute had arisen, it could have been dealt with under article 8 of the collective agreement. Ontario Hydro's failure to conduct a mark-up meeting deprived the Union of the opportunity to make representations to Ontario Hydro about that work.

15. We do not accept that Ontario Hydro may assign work as it sees fit without regard to article 8 of the collective agreement. If the manner in which Ontario Hydro reaches a decision over a work assignment is contrary to the collective agreement and Ontario Hydro is then subsequently faced with a grievance over the way in which it assigned the work, it cannot be heard to claim that the grievance is not proper because it is actually a work assignment dispute. To permit Ontario Hydro to successfully advance that position would simply allow Ontario Hydro to breach the collective agreement with impunity since the arbitrator under the Plan may only award the assignment of work and cannot make an award of compensation.

16. We have the jurisdiction to deal with this matter because the grievance claims a violation of the collective agreement by Ontario Hydro's failure to convene a mark-up meeting. The work assignment dispute on which Ontario Hydro relies to claim that we should not hear this grievance

ance arose as a consequence of that failure. A grievance properly referred to the Board alleging a violation of a collective agreement under section 124 of the Act is a matter over which the Board has jurisdiction, subject to any relevant constitutional considerations. It seems to us that Ontario Hydro was arguing that the Board should decline to hear the grievance as an exercise of discretion because it was properly a dispute over a work assignment. The issue of the Board's jurisdiction would only arise in this context if a complaint was made under section 91 of the Act and the provisions of section 91(14) of the Act were applicable. In other words, while this grievance may appear to relate to a dispute over a work assignment, it is principally a matter of collective agreement application and administration and is therefore properly before the Board. Thus, we find that this matter should be disposed of by the Board. In this regard, we refer to the approach taken by the Board in *Ontario Hydro*, [1982] OLRB Rep. March 428 where the Board wrote at 430-431:

"The applicant argued that the Board ought to entertain this grievance because Ontario Hydro has failed to consider evidence of established practices within the industry when making the jurisdictional assignment as required by Article 6.2 of the collective agreement. The applicant characterized its grievance as a preliminary issue to any assignment of work and which requires resolution prior to adjustment in accordance with the procedure established by the Impartial Jurisdictional Disputes Board (the "IJDB") or any other successor agency of the Building and Construction Trades Department. The applicant conceded that there are two aspects to this grievance, namely, the refusal by Ontario Hydro to assign certain work to it and, secondly, the dispute between the parties over the interpretation of Article 6.2 of the collective agreement. The applicant concedes that while the first aspect of grievance has jurisdictional overtones, the second aspect does not contain jurisdictional overtones and involves the interpretation of the language of a collective agreement.

The respondents argued that the Board does not have jurisdiction to entertain the alleged grievance because the applicant has alleged a violation of the jurisdictional dispute article of the collective agreement. The respondents referred to the provisions of Article 6 as providing a method of resolving jurisdictional disputes before the IJDB. In these circumstances, it was the position of the respondents that the Board does not have jurisdiction to entertain the alleged grievance and that the proper recourse is for the applicant to adjust its jurisdictional claims before the IJDB.

The Board is of the opinion that notwithstanding the jurisdictional overtones to this grievance, the applicant is entitled to have the interpretation to be given to the language of Article 6.2 of the collective agreement by the Board pursuant to the provisions of section 124 of the Act. However, the Board agrees with a previous decision of this Board (involving similar issues in an application made under the provisions of section 124) that once the issue of the interpretation to be given to certain language has been determined, aspects of the grievance may give rise to a jurisdictional dispute. See Board decision 1560-81-M, dated December 10, 1981 (unreported). When that point has been reached the Board would be prepared to consider representations as to whether the Board has jurisdiction to continue to entertain this application."

17. Ontario Hydro claims that a mark-up meeting was not required in respect of the deut./de-deut. systems. Counsel for Ontario Hydro pointed out that the union did not claim jurisdiction over 16" and 20" Schedule 40 carbon steel piping used to carry air from the pressure safety valve vents in the containment system. That particular work was part of an Ontario Hydro mark-up meeting dealing with the containment system. The containment system is not connected with or even related to the D₂O vapour recovery system.

18. We are of the view that Ontario Hydro cannot rely on a mark-up meeting over one system which is entirely unrelated to the deut./de-deut. systems or the D₂O vapour recovery system to justify not holding a mark-up meeting in respect of the deut./de-deut. systems. That position is without merit in view of the evidence about the mark-up meeting convened by E.S. Fox on the D₂O vapour recovery system which dealt with work that was virtually identical to the work on the deut./de-deut. systems that is the subject of this grievance. Ontario Hydro asserted before us that

the work which was the subject of the E.S. Fox mark-up meeting did not include the work which gave rise to this grievance. The evidence before us was clear that mark-up meetings relate to specific contracts or systems. The parties are free to use decisions made at those mark-up meetings to propose, defend and argue about work assignments on future work. We do not, however, accept the submission that a mark-up meeting over the containment system permits Ontario Hydro to unilaterally decide, without a mark-up meeting, who will be assigned to perform work on an entirely different system particularly in the face of a mark-up meeting which covered virtually identical work in a connected system.

19. Additionally, the evidence was quite clear that no one at Ontario Hydro had made a decision about whether to convene a mark-up meeting with respect to the deut./de-deut. systems. It seems to us that Ontario Hydro either did not consider the small percentage of pipe in those systems which carry D₂O vapour sufficient to warrant convening a mark-up meeting, or the persons at Ontario Hydro who make the decisions about convening mark-up meetings or assigning work were not aware of the fact that those two systems had a small portion of piping which carried D₂O vapour.

20. In *Ontario Hydro*, Board File No. 2405-86-M, September 12, 1987, unreported, the Board discussed the requirement to hold mark-up meetings. We accept, as did the Board in that earlier decision, that a mark-up meeting need not be held for all work that Ontario Hydro will perform. Nevertheless, the evidence before us indicated that contractors other than Ontario Hydro who are bound by the collective agreement convened mark-up meetings at Ontario Hydro's request with respect to the work that they do under contract for Ontario Hydro. The explanation offered by Ontario Hydro was that contractors have specific definable work set out in their contract and mark-up meetings are convened to deal with that work under those contracts. It seems to us that when Ontario Hydro is doing its own construction, the obligations of the collective agreement are no different. Section 8.2 of the collective agreement requires "regular mark-up meetings [to] be conducted for each project The purpose of these mark-up meetings is to indicate to the Unions the work which is about to be carried out by the Employers in order to minimize the potential for jurisdictional disputes." We accept that mark-up meetings need not be convened where the identical system to the ones under construction has already been the subject of a mark-up meeting. Where, however, there has never been a mark-up meeting which dealt with a particular type of system, we believe that Ontario Hydro must establish that such a mark-up meeting is not necessary as "the work" on that system had already been the subject of a mark-up meeting which dealt with an identical or closely analogous system.

21. In this case, the work discussed in the mark-up meeting over the containment system was not analogous to the work done in the deut./de-deut. systems. While we accept that both systems involve Schedule 40 carbon steel piping, work assignments are not simply based on the material that is the subject of the work. Other factors are relevant to work assignments, such as the location and purpose of the work, the ultimate use of the finished work, and prior assignments of similar work. It appears to us, as it did to Mr. McCormick, that the work marked up at the E.S. Fox meeting in relation to the D₂O vapour recovery system was almost identical to the work that gave rise to this grievance.

22. In our opinion, Ontario Hydro violated section 8.2 of the collective agreement by failing to convene a mark-up meeting to deal with the work of fabricating and installing 6" carbon steel Schedule 40 piping used to carry D₂O vapour from the fume hoods and sampling cabinets in the deut./de-deut. systems to the D₂O vapour recovery system.

23. Counsel for the applicant sought a prospective mandatory order and damages. In our

view, a prospective mandatory order is not appropriate where there is a genuine difference of opinion over the interpretation or application of the collective agreement. We do not accept that the respondent had flouted the collective agreement to the extent necessary to prompt the Board to issue an order in the nature of a "*quia timet*" injunction. While we no doubt have the jurisdiction to make such an order, see *Polax Tailoring Limited*, (1972), 24 L.A.C. 201 (Arthur), application for judicial review dismissed, sub. nom. *Samuel Cooper and Company Limited*, (1973), 35 D.L.R. (3d) 501, we exercise our discretion not to do so. The Divisional Court, in dismissing the application for judicial review of that arbitration award wrote at 506:

"In our opinion, the jurisdiction of the arbitrator was sufficiently wide to encompass a full range of remedy, unless expressly limited by the *Labour Relations Act* or the terms of the collective agreement. I can find no such limitation and the wording of s. 37(1) of the Act is such that the arbitrator was correct in this particular case in making the orders provided.

In any event, the applicant before us is seeking an extension of time as well as the application of the extraordinary remedy of *certiorari*. It is our opinion that the applicant is not entitled to such remedy in view of the oppressive, highly unfair, and unreasonable conduct of the company in dealing with its unions. In the result, therefore, the application for judicial review will be dismissed, with costs."

The evidence fell far short of establishing that Ontario Hydro dealt with the applicant in an oppressive, highly unfair or unreasonable manner and thus we do not think an order in the nature of a *quia timet* injunction compelling Ontario Hydro to comply with the collective agreement is warranted.

24. Counsel for Ontario Hydro also resists the claim for damages on the grounds that as this was a dispute over a work assignment, damages are not payable by reason of the rules of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. Article 5, section 9 of the plan provides:

"The Arbitrator is not authorized to award back pay or any other damages for a misassignment of work. Nor may any party to this Plan bring an independent action for back pay or any other damages, based upon a decision of an Arbitrator."

In this case, we do not need to decide whether the applicant is precluded from seeking damages or whether the Board is prohibited from awarding damages because, in our view, the Union's action is not "based upon a decision of an Arbitrator". As we have found earlier, this grievance alleged a violation of the collective agreement. It was not a grievance over a work assignment. The grievance did have jurisdictional overtones, and to that extent was the subject of an award by the plan. We are not, however, awarding damages based on the award of the work to the Union by the arbitrator under the Plan. Rather, the damages that the applicant is entitled to recover are compensation for the loss caused by Ontario Hydro's failure to convene a mark-up meeting. We therefore are satisfied that an award of damages is part of an appropriate remedy. This is not say, however, that the Union can claim and recover damages under this collective agreement in cases where the grievance is principally a dispute over the assignment of work.

25. The Board therefore:

- (1) declares that Ontario Hydro violated section 8.2 of the collective agreement by failing to convene a mark-up meeting with respect to the work of fabricating and installing 6" Schedule 40 carbon steel piping used to carry D₂O vapour from the moderator and primary heat transport deuteration and de-deuteration systems to the D₂O vapour recovery system; and

- (2) directs Ontario Hydro forthwith to compensate the applicant for the loss attributable to Ontario Hydro's violation of article 8.2 of the collective agreement.

26. This panel of the Board shall remain seized with determining the quantum of damages payable by Ontario Hydro should the parties be unable to agree upon it.

0226-88-R Christian Labour Association of Canada, Applicant v. **Reitzel Heating & Sheet Metal Ltd.**, Respondent, v. Sheet Metal Workers' International Association, Local 562, Intervener

Bargaining Unit - Certification - Construction Industry - CLAC applying under s.144(5) to displace the Sheet Metal Workers province-wide ICI craft bargaining unit - Board practice is to give CLAC all unrepresented trades employed in a Board area without reference to sector - Board determining that CLAC can obtain bargaining rights for a craft on a displacement application - CLAC can also limit application to the ICI sector where it is displacing another union - Bargaining rights limited to Board area - Vote counted

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

APPEARANCES: *William R. Herridge*, *Peter Van Duyvenvoorde* and *Maynard Witvoet* for the applicant; *Robin B. Cumin*, *John Bilawski* and *Louis Reitzel* for the respondent; *Bernard Fishbein* and *Cliff Coffin* for the intervener.

DECISION OF THE BOARD; December 21, 1988

1. This is an application for certification made under the construction industry provisions of the *Labour Relations Act* ("the Act"). The applicant had requested that a pre-hearing representation vote be taken. By decision of the Board (differently constituted) dated May 16, 1988 the Board appointed a Labour Relations Officer to, *inter alia*, confer with the parties as to the description and composition of the bargaining unit, the description and composition of the voting constituency, the list of employees as of the terminal date to be used for the purposes of any vote that may be directed by the Board and to report to the Board.

2. By subsequent decision of the Board (differently constituted) dated June 13, 1988 the Board directed that a pre-hearing representation vote be taken of the employees in the following voting constituencies:

Voting Constituency #1

All journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

Voting Constituency #2

All journeymen sheet metal workers, sheet metal apprentices, pipefitters, journeymen air conditioning refrigeration mechanics, apprentice air conditioning refrigeration mechanics and labourers employed by the respondent in Board Area 6 (the Regional Municipality of Waterloo except that portion of the geographic Township of Beverly annexed by North Dumfries Township) save and except non-working foremen and persons above the rank of non-working foreman.

3. The vote was taken June 30, 1988. Voters in constituency #1 were asked to indicate whether they wished to be represented by the applicant Christian Labour Association of Canada ("CLAC") or the intervener Sheet Metal Workers' International Association, Local 562 ("Sheet Metal Workers") in their employment relations with the respondent, Reitzel Heating & Sheet Metal Ltd ("Reitzel"). Voters in constituency #2 were asked to indicate whether or not they wished to be represented by CLAC in their employment relations with Reitzel. The ballots in voting constituency #1 were segregated from the ballots in voting constituency #2. In addition the Sheet Metal Workers challenged the right of Brad Reitzel and Bruce Currie to vote. Their ballots were also segregated. Both ballot boxes were sealed at the direction of the Board. The Board further directed that the matter be listed for hearing as soon as possible after the vote.

4. The reason for the two voting constituencies, and the reason why this matter was listed for hearing, was that in this application CLAC is seeking to displace the Sheet Metal Workers province-wide industrial, commercial, institutional ("ICI") craft bargaining unit. The Sheet Metal Workers submitted that because the CLAC is neither an employee bargaining agency ("E.B.A.") nor an affiliated bargaining agent ("A.B.A.") CLAC cannot be certified pursuant the section 144(1) of the Act, but can only be certified pursuant to section 144(5). The Sheet Metal Workers therefore submitted that the CLAC could only be certified for all trades at work on the application date in all sectors in Board area 6. The parties were agreed that Reitzel did not employ any persons outside of Board area 6 on the date of application.

5. The CLAC and Reitzel both submitted that in a displacement application of this nature, CLAC is entitled to be certified for a unit of employees consisting solely of:

all journeymen Sheet Metal Workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario save and except non working foremen and persons above the rank of non-working foreman.

6. The CLAC's entitlement to a pre-hearing vote could not be affected by the Board's ultimate resolution of the divergent submissions as outlined in paragraphs 4 and 5 herein. The matter came on for hearing and was heard on September 9, 1988. During the course of the hearing the Sheet Metal Workers withdrew their challenges regarding the eligibility of Brad Reitzel and Bruce Currie to vote.

7. The respective positions of the CLAC and the Sheet Metal Workers were succinctly summarized in letters sent by their counsel to the Board. In a letter dated June 16, 1988 counsel on behalf of the CLAC states:

CLAC'S position is that since this is a Displacement Application, and in accordance with the Board's well established jurisprudence, the appropriate bargaining unit is the unit held by the

trade union which CLAC seeks to displace. CLAC further takes the position that since this is a Displacement Application, it is unnecessary for CLAC to apply for an "all employee unit", and that there is nothing in Section 144 of the *Labour Relations Act* that would in any way prevent the Board's normal principles with respect to displacement applications from applying.

8. In a letter dated June 13, 1986 counsel on behalf of the Sheet Metal Workers stated:

It is the Intervener's position that the bargaining unit sought by the Applicant is inappropriate. The Applicant is a trade union that is outside of the scheme of provincial bargaining and accordingly can apply in the construction industry only pursuant to Section 144(5) of the Act. Accordingly the Intervener is not entitled to a bargaining unit described only in terms of the industrial, commercial and institutional sector of the construction industry and not entitled to a bargaining unit that covers the Province of Ontario. Moreover the Applicant is not a craft union and not entitled to a craft bargaining unit. The Applicant purports to rely on the Board's policy with respect to displacement applications for certification to justify its claim for the sought-after bargaining unit. The Intervener submits that the Board's displacement policy can no longer stand in the face of Section 144 of the Act which is the mandatory section for all construction industry applications.

9. These respective positions were elaborated upon at the hearing at which time both counsel submitted some authority in support of their position. None of the cases were directly on point and it would appear that this is the first time this issue has been raised in this manner since the current provisions relating to province-wide collective bargaining in the ICI sector of the construction industry were enacted.

10. Counsel on behalf of the Sheet Metal Workers submitted that a trade union applying pursuant to subsection 5 cannot obtain a bargaining unit circumscribed by the parameters of section 144(1) i.e. a craft bargaining unit, confined to the ICI sector and provincial in scope. Counsel pointed to the longstanding practice of this Board in defining the usual or customary bargaining unit where the CLAC has applied for certification pursuant to section 144(5) as "all unrepresented trades" employed by the employer on the date of the making of the application confined to a specific Board area and without reference to sector. Counsel submitted that this long standing practice was in conflict with an equally well-established, long standing practice of the Board that, in an application for certification by way of displacement of an incumbent trade union, the appropriate bargaining unit is the unit in the collective agreement. Counsel suggested however that, in the construction industry, the Board's policy regarding displacement applications has been gradually eroded by virtue of the Board's application of section 144(1) and section 144(3) and the confines contained therein. As a result, counsel submitted that in the present case, the Board's usual practice of determining appropriate bargaining units under section 144(5) as all trades employed in a geographic area should prevail and take precedence over the Board's policy in respect of displacement applications.

11. In support of his position that the Board's displacement policy has been gradually eroded in the construction industry, counsel referred to two cases: *Crown Electric*, [1982] OLRB Rep. May 660 and *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166.

12. In *Crown Electric* the Board was considering an application by the International Brotherhood of Electrical Workers Local 1687 (the IBEW), an A.B.A., to displace the CLAC by way of an application made pursuant to section 144(1) i.e. the ICI sector and one Board area. The bargaining unit described in the Collective Agreement was broader and did not contain a reference to the ICI sector. The CLAC and respondent employer in that case argued that, in light of the Board's long standing policy in displacement applications, the appropriate bargaining unit was the bargaining unit described in the Collective Agreement. The IBEW successfully argued that, as it was seeking to represent employees in the ICI sector of the construction industry, the unit which it

sought *had* to conform to the requirements of section 144(1). Counsel submits that in that instance therefore the Board's policy regarding displacement applications was eroded by reason of the provisions of section 144(1). Similarly, he submits that *Aeroblock and Precast Limited* is another example where the Board held that the displacement policy of the Board could not survive in the face of section 144 of the Act. (See in particular paragraph 17 of that decision.)

13. Counsel submitted that, although those cases involved applications for certification brought by an A.B.A. pursuant to section 144(1), by analogy they apply to the case before us. Counsel referred to the rationale of the displacement policy of the Board i.e. a union seeking to displace an incumbent should accept what has proven to be a viable bargaining relationship and accept the confines of that relationship. He asks rhetorically: if that rationale does not survive applications made under section 144(1) and 144(3), why should it survive applications made under section 144(5)?

14. Finally, counsel developed a "fairness" argument to support his submissions that the CLAC must take an "all trades at work on the date of the application" unit. It was his submission that unions such as the Sheet Metal Workers i.e. those governed by the definition of an A.B.A., have had their organising opportunities circumscribed by the parameters of section 144(1). For example, the Sheet Metal Workers could not seek to displace a Carpenters provincial ICI unit because they could not represent carpenters pursuant to their Sheet Metal Workers' provincial agreement. Similarly, Sheet Metal Workers could not have displaced all trades represented by the CLAC had the present roles been reversed and the CLAC been the incumbent bargaining agent for employees of Reitzel. It was argued that to permit the CLAC to, in effect pick and choose the bargaining units it wishes to represent, is to put it in a better, more advantageous position than traditional craft unions in the construction industry. Moreover, such a benefit is given to the CLAC to the detriment of the employees who are themselves restricted in their choice as to which trade union can represent them pursuant to section 144(1).

15. In response to these submissions, counsel on behalf of the CLAC stated that as the provisions of section 144(1) of the Act are inapplicable, cases decided pursuant to that section are also inapplicable. Counsel stated that the effect of section 144(5) is that, for trade unions such as the CLAC the rest of section 144 does not exist. Counsel submitted that there were no legislative limitations or parameters set out in section 144(5) which would impact upon the Board's determination as to the appropriate bargaining unit. In section 144(5) applications, the appropriateness of the bargaining unit stands to be determined pursuant to section 6(1) of the Act. Counsel reiterated the Boards' general policy that pursuant to section 6(1) of the Act, in a displacement application the policy of the Board has been that the appropriate unit is the unit held by the incumbent trade union. Prior to the enactment of section 144 this policy was applicable to applications for certification in the construction industry made by non-craft unions.

16. In *Duron Ontario Limited*, [1976], OLRB Rep. Nov. 734 the Board stated at page 739:

13. From time to time the set of circumstances which are present in this application are presented to the Board. The Board characterizes this application as a situation where an incumbent craft trade union represents members of a craft - cement masons and cement masons' apprentices - and where some of them have indicated a preference to be represented by another trade union. In these situations, the Board has generally held that the appropriate bargaining unit is the unit in the collective agreement. The unit in the collective agreement is regarded as a displacement unit and is determined with reference to section 6(1) and not section 6(2) [now section 6(3) of the Act]. Reference is made to the *J. H. McLeod and Sons Limited* case, OLRB Rep. Dec. 1969, p. 1100 and to the *Canwall Contractors Limited* case OLRB Rep. July 1975 p. 532. If the Board were to accept the argument that in a displacement situation the appropriate bargaining unit is to be determined with reference to section 6(2) [now section 6(3) of the Act];

this would mean, in many instances, that only an incumbent trade union would possess the necessary requirements to represent a given craft notwithstanding a wish by certain members of that craft to have another trade union represent them in collective bargaining. In our view, under The Labour Relations Act no trade union possesses a monopoly with respect to representing any bargaining unit of employees.

In this case counsel for the CLAC placed particular emphasis on the “democratic theme” of the decision, namely the right of employees to be represented by the trade union of their choice. To deny displacement applications in circumstances such as these, unless the trade union seeking to displace also sought to represent all other unrepresented trades, would have the effect of prohibiting competition amongst trade unions and promote trade union monopolies of the “crafts”.

17. Counsel submitted that the advent of province-wide bargaining did not, and does not affect the application of the Board’s policy on displacement applications in respect of those trade unions who fall within section 144(5) of the Act. Province-wide bargaining affected only those trade unions which must now conform to the statutory provisions of section 144(1) and section 144(3) when bringing an application for certification in the construction industry. In support counsel referred to the Board’s decision in *Matterhorn Construction (Hamilton) Limited*, [1981] OLRB Rep. Sept. 1276 where the Board stated at page 1278:

7. Since Local 183 is not a trade union represented by an employee bargaining agency in respect of employees engaged in concrete forming construction, it is not a union which has the option of deciding, when it is applying for certification in respect of employees engaged in concrete forming construction as referred to in the designation of the labourers employee bargaining agency, whether its application relates to the industrial, commercial and institutional sector of the construction industry and, therefore, comes under subsection 1 of section 131a or does not relate to that sector and comes under subsection 3. Therefore, the only avenue open to Local 183 when it is seeking bargaining rights for employees engaged in concrete forming construction in subsection 5 of section 131a of the Act. Accordingly, the Board determines that this application is made pursuant to subsection 5 of section 131a. It is patently clear that subsection 5 contains no reference to construction industry sectors. Thus it remains for the Board, in dealing with applications for certification coming within that subsection, to determine whether bargaining rights will be granted with or without sectoral reference. *In other words, it leaves the Board in the same position in respect of these applications as it was prior to the introduction of section 131a into the Act.*

[Emphasis added]

18. Counsel submitted that *Clarence H. Graham Construction Limited*, *supra* also accepted that the policies set out in *Duron Ontario*, *supra* survived the advent of provincial bargaining for those unions not affected by sections 144(1) to 144(4):

... Subsection 5 deals with applications by “a trade union” that is not represented by a designated or certified employee bargaining agency”, that is trade unions not under the regime of province-wide bargaining. *For such trade unions it is clear that they are not affected by subsections 1 through 4 and clearly the Board policies set out in the Duron case continue to apply with respect to applications for certification by such trade unions.*

(Paragraph 6, page 1199)

[Emphasis added]

19. One of those policies is the Board’s policy on displacement applications. Although *Crown Electric* does indicate that where a trade union is required to bring its application under section 144(1) of the Act it must meet the requirements of that section, it also emphasizes that if section 144(1) is inapplicable (as is the case here), “the Board’s long standing policy that where an applicant seeks to displace an incumbent bargaining agent and where a Collective Agreement is in

force, the appropriate bargaining unit is a unit described in the collective agreement between the employer and the incumbent” continues to be applicable.

20. Finally, in response to the position of counsel for the Sheet Metal Workers that the CLAC could not be certified for a province-wide bargaining unit but could only be certified on a geographic i.e. Board area basis, counsel for the CLAC submitted the decision of the Board in *Ben Bruinsma and Sons Limited*, [1984] OLRB Rep. Nov. 1542. In that case, the CLAC had been certified for a limited geographic area, but by voluntary recognition had expanded the geographic scope of the bargaining unit to all of Ontario. At page 1545 the Board stated that:

Further, there is nothing in the Act which prevents a trade union that has been certified by the Board with respect to a limited geographic area from entering into a voluntary agreement with the employer to expand the geographic scope of the unit.

The Board went on to state at page 1548:

Having regard to all of the foregoing, we are satisfied that CLAC currently represents an “all employee” bargaining unit of the respondent’s employees across the province of Ontario. In these circumstances, and given both the provisions of section 144(1) of the Act, as well as the Board’s general policy in displacement situations of retaining the existing geographic scope of the bargaining unit, we are satisfied that the appropriate bargaining unit with respect to both applications before us is a unit which encompasses the entire Province of Ontario, including the counties of Essex and Kent.

21. Counsel on behalf of the intervener Reitzel supported the position of counsel for the CLAC. He argued that the two important matters to be balanced in this instance were (a) this particular employer’s interest in ensuring that employees were represented by the trade union of their choice and (b) the interest of employers in the construction industry in ensuring that the fabric of provincial bargaining be maintained. It was his position that those two objectives could be met by permitting the CLAC to displace the Sheet Metal Workers in the ICI sector of the construction industry in the Province of Ontario.

22. In reply counsel for the Sheet Metal Workers submitted that the ratio of *Matterhorn Construction (Hamilton) Limited* was simply that, in the area of concrete forming, it was unnecessary for the applicant Local 183 of the *Labourers’ International Union of North America*, (LIUNA) to bring its application for certification in conformity with the bargaining unit descriptions specified in section 144(1) and 144(3) because LIUNA Local 183 was not a trade union represented by an E.B.A. in respect of employees engaged in concrete forming construction. It was submitted that the quote from that decision referred to in paragraph 19 herein had to be read in context of the fact situation. It was submitted that the decision therefore did not stand for the proposition that the Board’s policies which predated the enactment of the provincial wide bargaining provisions of the Act survived the enactment of section 144.

23. In response to the “democratic principle” espoused by counsel for the CLAC and referred to in *Duron Ontario Limited*, counsel submitted that the democratic principle had itself been affected by the enactment of section 144. In light of section 144 and the Board’s jurisprudence regarding the application of section 144 it was impossible for employees to cross craft lines and to be represented by another craft union in the ICI sector of the construction industry in the province of Ontario. It was further submitted that, in circumstances such as these, employees do in fact have a choice as to which union they wish to have represent them. If employees want to be in a craft unit they will have to be represented by a craft union, if they don’t want to be in a craft unit they can choose to be represented by a non-craft union which must also represent all other trades at work on the date of application. It was further submitted that if the CLAC was successful in its

position before this Board, certain employees would in effect become a “craft unit” without being represented by a craft union. Similarly, the CLAC would in effect obtain a provincial ICI bargaining unit without any of the encumbrances or obligations imposed upon those craft unions which are A.B.A.’s of the E.B.A. (or the E.B.A. itself).

24. Finally, counsel reiterated that it was a matter of the Board’s discretion to determine the appropriateness of the bargaining unit where the application was made under section 144(5). It was his position however that in light of the “evolution” of the Board’s jurisprudence after the enactment of section 144, the Board’s policy regarding displacement applications could not and should nor survive in circumstances such as these. Counsel submitted that, in the exercise of our discretion we ought not to let the CLAC obtain “through the back door” a bargaining unit it would not otherwise be entitled to if this were a fresh application for certification rather than an application to displace in existing unit.

25. Having thus set out the various submissions of the parties we can now turn to our analysis and decision in this matter. The issue before us revolves solely around a matter traditionally viewed as a matter involving the discretion of the Board, namely to determine “the unit of employees appropriate for collective bargaining”. The relevant provisions of the Act are found in sections 6(1), 117(f), 119(1) and 144 of the Act. These state:

6.-(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

117.-(f) “trade union” means a trade union that according to established trade union practice pertains to the construction industry.

119.-(1) Where a trade union applies for certification as bargaining agent of the employees of an employer, the Board shall determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area and it shall not confine the unit to a particular project.

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

(2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(3) Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

(4) A voluntary recognition agreement in so far as it relates to the industrial, commercial and institutional sector of the construction industry shall be between an employer on the one hand and either,

- (a) an employee bargaining agency;
- (b) one or more affiliated bargaining agents represented by an employee bargaining agency; or
- (c) a council of trade unions on behalf of one or more affiliated bargaining agents affiliated with the council of trade unions,

on the other hand, and shall be deemed to be on behalf of all the affiliated bargaining agents of the employee bargaining agency and the defined bargaining unit in the agreement shall include those employees who would be bound by a provincial agreement.

(5) Notwithstanding subsections (1) and (4), a trade union that is not represented by a designated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf.

26. There is no dispute that the CLAC is a trade union within the meaning of section 117(f) of the Act. It is not however what is commonly referred to as a "craft union" and, as it is neither an E.B.A nor an A.B.A., it is not a union to which sections 144(1) and 144(3) of the Act apply. As section 144(3) is not applicable, the opening words of that section, namely "notwithstanding subsection 119(1)..." are also not applicable. In resolving the issues regarding the appropriate bargaining unit therefore, we must consider subsection 144(5) and section 119 of the Act. In an application for certification made pursuant to subsection 144(5) of the Act, the appropriateness of the bargaining unit stands to be determined pursuant to subsection 6(1) of the Act. In our view, in light of the fact that this is an application in the construction industry, the provisions of subsection 119(1) supplement those set out in subsection 6(1).

27. We concur with the general proposition that in the exercise of the Board's discretion, in a displacement application the policy of the Board has been that the appropriate bargaining unit is the unit held by the incumbent trade union. In the absence of some clear and compelling reasons why this long standing policy of the Board ought to be disregarded, we would not lightly set aside or interfere with this well established policy. We are of the view that such clear and compelling reasons do exist in the circumstances of this case where we are concerned with province-wide bargaining in the ICI sector of the construction industry. In our opinion, the Board's general policy on displacement applications is not necessarily applicable in the ICI sector of the construction industry in light of the statutorily compelled scope of the incumbent's unit.

28. In an application for certification by way of displacement, the Board has stated that the established bargaining structure is *prima facie* appropriate - particularly in those instances where there has been a long, well established collective bargaining relationship. It is difficult to envisage any better evidence of the "appropriateness" of a bargaining unit than the situation where the parties to a collective agreement have developed both the bargaining unit and the bargaining structure which have proven viable over a period of time. In the present circumstances however, because the incumbent is an A.B.A., when it organizes employees in the ICI sector of the construction industry, the scope of its bargaining unit and its rights to represent employees in the ICI sector, and its bargaining structure with Reitzel have been predetermined by the legislature. In the ICI sector,

A.B.A.'s are prevented from organizing certain employees, because of the limitations found in their provincial designations. (See *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction Ltd.* [1983] OLRB Rep. March 407 and July 1104, *Superior Plumbing and Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Ltd.*, [1987] OLRB Rep. Oct. 1228.) Once organized by an E.B.A., employees are automatically plugged into the provincial agreement. Pursuant to the mandatory provisions of the Act, that collective agreement is a two-year agreement which expires bi-annually on the 30th day of April. We are of the view that where the legislation has, in essence, statutorily determined both the bargaining unit and the bargaining structure, the Board's policy that the incumbents' bargaining unit is *prima facie* appropriate, based as it is on the "history" of the collective bargaining relationship between the parties, need not necessarily prevail. The underlying assumption or rationale for the Board's displacement policy - the collective bargaining history of the parties, the implicit right of the parties to alter, extend or otherwise modify the bargaining unit to suit their needs - is not valid in instances where the incumbent is an A.B.A. or an E.B.A. and the raiding union is seeking to displace the incumbent's province-wide bargaining rights in the ICI sector.

29. In our opinion, the enactment of section 144 has both explicitly and implicitly restricted and fettered the Board's discretion to determine the appropriate bargaining unit when dealing with applications for certification in the ICI sector of the construction industry. The explicit fetters are found in the statutory language contained in subsection 1 to subsection 4 of section 144 and the manner in which those sections have been interpreted and consistently applied by this Board. The implicit fetters are found in both the statutory language, and the labour relations environment in which that language was originally enacted and subsequently amended, and the problems which the legislation sought to address. The legislative intent regarding province-wide bargaining in the ICI sector expressed and encompassed in the Act has led us to conclude that, where there are conflicts or inconsistencies between the Board's usual policies or practices and the scheme of construction industry certification and province-wide bargaining in the ICI sector, the latter should prevail. Before examining the scheme of application for certification in the ICI sector of the construction industry, we turn briefly to provide some historical background and labour relations context to those provisions. Both these aspects have had a considerable impact upon the policy considerations we have addressed and consequently upon the exercise of our discretion in determining the appropriate bargaining unit.

30. Prior to the advent of province-wide bargaining, the Board certified trade unions in the construction industry only on a Board area basis. This was so whether the union was a "craft union" to which section 6(2) (now section 6(3)) applied, or a non craft union applying pursuant to section 6(1). Prior the enactment of province-wide bargaining there was also no express legislative prohibition which prevented craft unions from organizing employees who were not members of their craft. Prior to the advent of province-wide bargaining there were several hundred different bargaining structures between the various craft unions in the construction industry and the employers whose employees were represented by these craft unions. The report of the Industrial Inquiry Commission Into Bargaining Patterns In The Construction Industry, May [1976] (the Franks Report) identified various problems which related directly to this multitude of bargaining structures and the substantial variation in the bargaining patterns from trade to trade. Chief amongst these problems was the intra-trade and intra-regional bargaining rivalries (colloquially referred to as whip sawing and leap frogging respectively). The Franks Report identified the problem in the following terms:

In the Background Paper a tentative formulation of the problem was set out to assist those making representations to the Commission. The problem was stated as follows:

"The problem we are confronted with is how the structure of collective bargaining in

the construction industry can be changed so that those who affect bargaining and are affected by it actually do the bargaining”.

This is not to say that bargaining in the construction industry is not representative, but rather that it is affected, i.e. influenced, by other bargaining situations and each bargaining situation affects other situations.

The most common example of this situation occurs in those trades where bargaining takes place with a number of locals across the province. In any particular locality bargaining in that locality is often unable to respond to local conditions because of pressures from other localities. Thus, the size of a settlement in a neighbouring locality may be a more important pressure at the bargaining table than the fact that there is little construction activity in the locality where bargaining is taking place. The proper response in such a situation might be to stimulate construction activity by reducing construction costs. Thus, we are faced with a conundrum. Although the bargaining appears to be local, it has actually been determined by bargaining elsewhere.

Further, although a particular locality may think that during its collective bargaining it is only dealing with its own problems, there is frequently no way that it can prevent its bargaining from affecting bargaining in other localities. These effects on neighbouring areas are not in themselves wrong. Indeed, no one ever bargains in isolation from other and it would be impossible to try to bargain in a vacuum. The problem arises when the present bargaining structures prevent those involved in collective bargaining from responding to the problems they are faced with in making a good collective agreement.

31. In addition, the Franks Report identified the problems of the “upsetting project” and “the need to maintain flexibility in the system”. “Flexibility” and the separate bargaining structures which had developed in the interest of flexibility, resulted in further fragmentation of the trades or in the development of new “sectors”. Those solutions however ran “the risk of creating parallel collective agreements to cover the same work” and increased the number of bargaining situations.

32. Legislated province wide bargaining pursuant to the *Labour Relations Act* was designed to systematically reduce the number of bargaining situations in the construction industry. It was designed to reduce and rationalize the number of bargaining patterns and alleviate and address these three principle problems that had plagued the industry and which had caused numerous work stoppages, and bitter conflict and competition between and amongst unions and employers.

33. Legislated province wide bargaining consolidated bargaining structures in the construction industry and raised the locus of negotiations to the provincial level. However, only the “craft” unions were *directly* affected by the concept of province-wide bargaining as the several hundred bargaining situations of these unions were reduced and rationalized to the present 26 designated province-wide structures. Independent “non-craft” unions such as the CLAC, which also organized in the construction industry were not *directly* affected by province-wide bargaining. Their status and existing bargaining structures were explicitly maintained through the enactment of the provision currently found in section 144(5). The CLAC, which was neither an affiliated bargaining agent nor an employee bargaining agency derived neither the benefits of the province-wide bargaining nor was it required to comply with the obligations, duties and responsibilities imposed upon the A.B.A.’s or E.B.A.’s subject to the province-wide bargaining scheme.

34. Notwithstanding counsel’s submissions upon the issue, we consider it inappropriate to enter into the “fairness” debate, or the debate as to whether an A.B.A. (sometimes also referred to as a craft union) or a non-A.B.A., non-craft union has the greater advantage as a result of the statutory provisions of section 144. Undoubtedly many different views can be expressed upon those matters. Our role, however, is to apply the language found in the Act in a manner consistent with the purpose of the Act and the legislative intent as expressed in section 144. We do note how-

ever the apparent quid-pro-quo of the statutory scheme. In the ICI sector, the E.B.A.'s and the A.B.A.'s were statutorily granted a province-wide bargaining unit (something which the Board would not normally have granted them *but for* the legislative scheme) and were granted the right to apply on behalf of all A.B.A.'s of the E.B.A. (again something which the Board would not usually have granted *but for* the legislative scheme). In exchange the E.B.A.'s or A.B.A.'s are restricted in organizing or representing employees who are not members or who do not "belong" to their craft or who do not fall within their designation. The CLAC is not subject to this quid-pro-quo. The CLAC was not statutorily granted the right to represent a province-wide bargaining unit, but neither is it prohibited from organizing or representing specific employees.

35. In our view, experience has shown that the current provisions relating to province-wide bargaining in the ICI sector of the construction industry have significantly alleviated the problems identified in the Franks Report. Although there are both proponents and detractors of the current system, it is our view that these provisions have indeed furthered harmonious relations between employers and employees and their trade unions. A primary policy consideration in the exercise of our discretion therefore has been to avoid results which are, or can be, harmful or detrimental to province-wide bargaining in the ICI sector. For this reason we have concluded that the present scheme of certifying trade unions in the construction industry which this Board has developed (in a manner consistent with the statute and the legislative intent as found in the statute) must prevail. Thus, where there is conflict between the Board's usual or normal application of section 144 to certification applications in the construction industry and the displacement policy, wherever possible, the former will take precedence.

36. The Board has interpreted section 144 as an exhaustive code applicable to all applications for certification in the construction industry brought before the Board. (see *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195 at paragraphs 6 and 8). Pursuant to that exhaustive code, a trade union which is an A.B.A. of a designated E.B.A. *must* bring its applications for certification under subsection 1 of section 144 if it relates to the ICI sector, or subsection 3 if it does not. A trade union which is not represented by a designated E.B.A. may bring an application under subsection 5 without reference to sector. In this latter instance the bargaining unit is normally defined as (1) all trades at work on the date of application, in (2) all sectors of the construction industry and (3) in a geographic area described by reference to a Board area.

37. Although generally the bargaining unit normally found to be appropriate for the applicant when it applies pursuant to section 144(5) is all trades at work in all sectors in a Board area, we are mindful of the fact that this is not a "fresh" application for certification but rather is an application for certification by way of displacement in which the CLAC is seeking to obtain bargaining rights held by an incumbent trade union. The issue to be determined therefore is whether CLAC's "usual" or "normal" bargaining unit can "fit" within this displacement application without doing violence to the scheme of province-wide bargaining in the ICI sector. Put differently, if CLAC cannot obtain a craft bargaining unit, confined to the ICI sector and provincial in scope if it applied for certification at first instance, can it obtain such a unit when it applies for certification by way of displacement? We are of the view that CLAC cannot by way of displacement obtain bargaining rights for a bargaining unit circumscribed by such parameters. We are also of the view however, that an application for certification by way of displacement is something quite different from a "fresh" application for certification and that different considerations do and should apply. For the reasons set out below we have concluded that in the circumstances of this case the CLAC can only obtain bargaining rights for a bargaining unit consisting of sheet metal workers and registered sheet metal apprentices employed in the ICI sector of the construction industry in Board Area 6.

A. In a displacement application can the CLAC obtain bargaining rights for a unit of employees, less than a unit of all trades at work on the application date?

38. The CLAC is not an A.B.A. or a “craft” union and is not normally certified to represent only members of a “craft” where there are other trades at work on the application date. Although there are no provisions in the Act, and in particular there are no prohibitions contained in section 144(5) which prohibit the CLAC from representing a unit of employees described in “craft” like terms, in keeping with the spirit and intent of province-wide bargaining (which is statutorily imposed upon only the A.B.A.’s or E.B.A.’s) and in recognition of the fact that, in-so-far as the CLAC was concerned province-wide bargaining merely preserved the status quo, in applications for certification brought by the CLAC, the Board has traditionally described the CLAC’s bargaining unit as an “all employee” type unit with specific reference to the unrepresented trades at work on the date of application. We would not have departed from that policy, notwithstanding the fact that this is an application for certification by way of displacement, but for the fact that requiring the CLAC to take an “all trades at work on the application date” would result in a number of inconsistent and anomalous results.

39. First, we are of the view, and it has long been the policy approach of the Board that an incumbent trade union should not be deprived of the bargaining rights it has acquired unless a vote is conducted *among the employees whom it represents*, and a majority of *those* employees have expressed their wish that they no longer wish to be represented by the incumbent. For this reason the Board has not, in the past, permitted a raiding union to “enlarge” the bargaining unit and displace an incumbent solely on the strength of its support in the “enlarged” or “add-on” portion of the unit.

40. The policy and rationale of the Board in this regard was followed and succinctly summarized by the Board in *Toronto East General and Orthopaedic Hospital Inc.* [1981] OLRB Rep. Feb. 225.

9. Where there is a request for a pre-hearing representation vote on a displacement application, the Board’s standard practice is to require the applicant to accept as a voting constituency the bargaining unit represented by the incumbent union. (See, for example, *Ethyl Canada Inc.* [1979] OLRB Rep. Oct. 985; *The Wellesley Hospital* [1976] OLRB Rep. Feb. 45; *Roland Lefebvre Lathing Limited* [1966] OLRB Rep. May 140.) If the applicant seeks to enlarge the bargaining unit the Board will establish two voting constituencies, the incumbent unit as one and the add-one segment as the other. To be entitled to a vote in each, the applicant must demonstrate membership support of 35 per cent in each voting constituency. (See *Ethyl Canada Inc.*, *supra*).

10. After a pre-hearing representation vote has been taken the Board determines the appropriate bargaining unit. Normally the bargaining unit found to be appropriate in a displacement situation is the incumbent’s bargaining unit. The Board may amend the unit, however, in the event the applicant wins to [sic] vote, or votes if more than one voting constituency has been established. (See *Roland Lefebvre Lathing Limited*, *supra*.) In *Wellesley Hospital*, *supra*, however, the Board refused the company’s request to carve out of the incumbent’s unit a group of employees. The Board expressed the view that when an applicant wins a displacement vote it is at least entitled to the same unit as was represented by the incumbent union.

...

13. In a displacement application, however, the Board’s general practice is to view the established bargaining structure as *prima facie* appropriate, particularly where the parties have themselves incorporated it into a collective agreement. In *Milltronics Limited* [1980] OLRB Rep. Jan. 56 the Board refused to accede to the employer’s submission that a unit larger than the existing unit was appropriate. At p. 58 the Board said,

Usually ... a “raiding union” must “take” what the incumbent union has.

(See also *Electrohome Limited*, [1967] OLRB Rep. Dec. 854).

14. In considering a displacement application for certification the Board has to be sensitive to the existence of an established bargaining relationship. The Board's practice of requiring the applicant to "take" what the incumbent has" emanates from the belief *that the employees in an existing bargaining unit should alone decide, as a separate group, whether they want to change bargaining agents*. In *Toronto Star Limited*, [1974] OLRB Rep. July 416 the vice-chairman, in his dissent on another point, explained the rationale supporting the Board's general practice. At p. 417 he said,

The reason for holding as appropriate the bargaining unit described in the scope clause of a collective agreement in a displacement application is because of the continued viability of the community of interests of employees affected by the application. It would be contrary to the efficacy of a past history of viable collective bargaining to upset the integrity of that bargaining unit without first soliciting the views of the employees affected.

15. In *Barnet-McQueen Co. Ltd.*, 59 CLLC ¶18,139 the Board was asked by the displacing union to find that a unit larger than the incumbent's unit was appropriate. The Board refused the request explaining that if it were to find a larger unit appropriate it would be possible for a union to displace another solely through its strength in the add-on portion of the unit and despite the views of the employees in the original or incumbent's unit. In *Barnett-McQueen* the Board dismissed the application because the applicant did not have sufficient membership support in the existing unit for a representation vote.

16. The instant case presents the Board with the reverse of the situation in *Barnet-McQueen*. The applicant union has in excess of 55 per cent membership support among the employees in the incumbent's bargaining unit. In the other segment of the enlarged bargaining unit for which it applies it does not have sufficient membership strength for a representation vote. If both the technical paramedical and professional paramedical segments were considered together as one bargaining unit, however, the applicant would have more than 45 per cent membership support.

17. Can the applicant union in a displacement application for certification sweep in a group of previously unrepresented employees solely on the strength of its membership support in the incumbent's unit and in the face of minimal support in the add-on group?

After referring to several cases the Board concluded:

22. ... In the Board's opinion it would be unfair, inappropriate and counter to sound labour relations to suddenly place the professional paramedical group of employees in a bargaining unit with the technical paramedical employees, thereby opening the door to their being represented by the applicant union, without giving them an opportunity to decide, as a separate group, if they want union representation.

...

28. For the reasons canvassed above the bargaining unit found appropriate by the Board in this case does not include the employees not covered by the incumbent unit. The Board will not sweep in this group of employees without regard to their wishes. The Board, therefore, will treat the add-on segment or the portion of the unit applied for by the applicant which does not correspond to the incumbent bargaining unit as, virtually, the object of a separate application for certification.

[Emphasis added]

The Board ultimately concluded that as less than 45% of the employees in the "add-on" unit were members of the trade union on the terminal date, the application in respect of those employees was dismissed.

41. We concur with the view that an incumbent trade union should not be deprived of the

bargaining rights it has acquired unless a vote is conducted among the employees whom it represents and a majority of those employees have expressed their view that they no longer wish to be represented by the incumbent. It is for this reason that the Board has *always* ordered a representation vote before terminating the bargaining rights of any trade union. We also concur with the view implicit in the dissent of the Vice-Chair in *Toronto Star Limited*, [1974] OLRB Rep. July 416 that the community of interest of employees already represented by an incumbent union is separate and distinct from the community of interest of employees unrepresented by any trade union. In a displacement application these two factors (i.e. a trade union should only be deprived of its bargaining rights by a majority vote conducted amongst employees it represents, and a separate community of interest of employees represented by an incumbent trade union) militate against finding as appropriate, a unit which is greater than the one found in the existing collective agreement between Reitzel and the Sheet Metal Workers. We are of the view that an "all trades at work on the application date" unit is not appropriate in this case.

42. In a displacement application, where a pre-hearing representation vote is requested, once the Board has determined the appropriate bargaining unit pursuant to section 9(4), the Board conducts a representation vote amongst the employees in the bargaining unit it has found appropriate. The vote is held pursuant to section 7(2) and 7(3) of the Act. If we were to accept the intervener's submissions that in a displacement application the CLAC is required to represent a broader "all trades at work" bargaining unit, we are immediately faced with the problem of what choice should be on the ballot in any vote conducted. In a displacement application the choice provided to employees represented by the incumbent is whether they wish to be represented by the incumbent trade union or by the raiding trade union (in this case the choice being either Sheet Metal Workers or the CLAC). In a displacement application employees are not provided with the "non union" option. Employees who wish to terminate the bargaining rights of an incumbent without choosing a new union to represent them must do so pursuant to the provision of section 57 of the Act. On the other hand, employees not currently represented by the incumbent do not have the option of choosing the incumbent. In any ballots cast by such employees the vote option would be whether such employees wish to be represented by the raiding union (the CLAC) or not. We note parenthetically that in any event the Minister's designation order pertaining to the Sheet Metal Workers, and the manner in which this Board has interpreted and applied the designation orders in the context of applications for certification in the construction industry, restrict the Sheet Metal Workers from representing employees other than sheet metal workers and registered sheet metal apprentices in the ICI sector in the construction industry. Thus, even if the Board were prepared to deviate from its normal or usual voting policies, in this instance employees of Reitzel other than sheet metal workers or registered sheet metal apprentices could not, in any event, be given the option of choosing the Sheet Metal Workers as their bargaining agent.

43. In determining whether a broader or enlarged bargaining unit such as the one urged upon us by the intervener is appropriate, we have considered and rejected the notion that the vote held in the bargaining unit determined to be appropriate by the Board could be counted sequentially. If counted sequentially, the votes of the Sheet Metal Workers currently represented by the intervener (i.e. voting constituency #1) could be counted first and only if a majority voted in favour of the raiding union (i.e. the CLAC) would the ballots cast by those in voting constituency #2 be counted. Although counting the votes sequentially would address the two concerns raised by the Board in *Toronto East General and Orthopaedic Hospital Inc.*, *supra*, we have determined that such an option is untenable. As a matter of principle, employees not currently represented by an incumbent should not be disenfranchised from voting as members of a bargaining unit found appropriate by the Board by a minority of that bargaining unit. Their right to have the ballots they cast counted should not be dependent on how other employees vote.

44. Moreover, we have serious reservations that the Board has the jurisdiction to conduct or count such a vote in this manner. In our view the statutory language of section 7(2) and section 7(3) indicates that the Board direct that a representation vote be taken of the employees of the bargaining unit. The majoritarian principle applied to such a vote ensures that if a majority of *all* employees in that bargaining unit desire to be represented by a trade union the Board shall certify the trade union. The language of section 7(3) is mandatory. If the majority of employees in the bargaining unit (which, if we were accept counsel's submissions would consist of all trades at work on the application date) voted in favour of a particular choice, the legislation dictates the results which *must* flow from such a result. The problem can best be illustrated by applying possible results to the facts at hand.

45. In this case, on the application date, Reitzel employed four sheet metal workers or registered sheet metal apprentices in the ICI sector (represented by the intervener) and seven other employees employed as pipe fitters, journeymen air conditioning refrigeration mechanics, apprentice air conditioning refrigeration mechanics and labourers. If, upon the taking of a representation vote, the CLAC had the support of the majority of the employees in this larger bargaining unit of eleven, section 7(3) dictates that the CLAC *must* be certified as a bargaining agent of the employees in the bargaining unit. This would be so regardless of the fact that this majority support may be achieved only because the CLAC had the support of six or seven of the currently unrepresented other trade employees, while *none* of the sheet metal workers or registered sheet metal apprentices voted in favour of the CLAC or desired to change their bargaining agent. Such a result would be contrary to the Board's long standing policy that a trade union should *only* be deprived of its bargaining rights by a majority vote conducted amongst the employees it represent. The other possible result is equally untenable. In this case, if the CLAC must obtain majority support of the enlarged unit consisting of "all trades at work" it could lead to the anomalous situation in which the four sheet metal workers would be unable to change their bargaining agent because the seven unrepresented employees do not wish to be represented by *any* bargaining agent. The four sheet metal workers would then continue to be represented by a bargaining agent whom they no longer desire. The "fate" of these four sheet metal workers would then effectively be determined by the numerical superiority of the seven employees whom, in this case, the CLAC has not sought to represent.

46. We note also that, if we were to determine that on a displacement application the CLAC could not take the existing unit but *must* acquire bargaining rights for an enlarged unit consisting of all trades at work on the application date, then logically the reverse should also be true. If the CLAC must *take* an enlarged bargaining unit on a displacement application, it follows that where the CLAC applies for certification it can also *seek* certification for an enlarged unit, including employees already represented by a craft union if its application for certification in respect of these latter employees is otherwise timely pursuant to subsections 5(2),(3),(4),(5) or (6). Thus, if the CLAC sought to be certified for a bargaining unit consisting of all trades at work, it would logically flow that by sheer numerical strength in that constituency, the CLAC might be able to "sweep in" the employees represented by the A.B.A. or craft union. Applied to the facts at hand for example, if the CLAC had applied to be certified for all trades at work which were not already represented by a union during the "open period" of the sheet metal workers ICI collective agreement, *and* had sought to include those sheet metal workers in the bargaining unit, the natural and logical consequence of counsel's argument is that, if the CLAC were able to show that more than 55% of the employees in the bargaining unit were members of the CLAC, the Board could certify the CLAC for the enlarged unit. Again, even if a vote were conducted and the CLAC had the support of a majority of the employees in this larger unit it would be certified for the larger unit (regardless of the fact that the majority support may be achieved only because, it had the support of all seven otherwise unrepresented trade employees and *none* of the four "craft" employees desired to change their bargaining agent). Such results would be equally anomalous as the possible results

which could flow from the counting of the ballots cast in the “all trades at work” bargaining unit which the intervener has proposed as appropriate.

47. Finally, we are of the view that granting the CLAC a unit described in “craft” like terms when it applies for certification by way of displacement is not inconsistent with the scheme of province wide bargaining. In fact, there are no provisions in the Act which prohibit the CLAC from representing a unit of employees described in “craft” like terms. Such a result is not impossible on a “fresh” application. In *Duron Ontario Limited*, *supra* the matter was put as follows:

12. Trade unions such as the Christian Labour Association of Canada, the Christian Trade Unions of Canada, the National Council of Canadian Labour and the Lumber, Sawmill Workers Unions are not craft trade unions and do not satisfy the provisions of section 6(2) [now section 6(3)]. The appropriate bargaining units for such trade unions are determined pursuant to section 6(1). In the event that such trade unions apply for certification in situations where an employer has only employees of a particular craft or classification at work on the date of filing, then such trade union is usually granted certification with respect to such particular craft or classification pursuant to section 6(1), for example, “carpenters and carpenters’ apprentices” or “electricians and electricians’ apprentices”. Such bargaining units resemble in description similar craft units which in appropriate situations are determined pursuant to section 6(2). [now section 6(3)]. This resemblance, however, is fortuitous and results from an employer having only one craft or classification at work on the date of filing.

B. In a displacement application can the CLAC obtain bargaining rights for only the ICI sector of the construction Industry?

48. The CLAC is neither an E.B.A nor an A.B.A.. Therefore, it is not normally granted bargaining rights limited to only the ICI sector. The Board’s usual practice is to grant the CLAC bargaining rights for a particular Board area without reference to sector. There are no provisions in the Act which prohibit the CLAC from acquiring bargaining rights in respect of persons employed in the ICI sector of the construction industry. Indeed, that the CLAC can obtain bargaining rights for employees employed in the ICI sector is well established. The Board *normally* grants certificates to the CLAC without reference to sector and in so doing includes employees employed in the ICI sector of the construction industry.

49. We have determined that to grant the CLAC bargaining rights limited to the ICI sector where it applies for certification by way of displacement is consistent with the Board’s application of its displacement policy and is neither harmful nor inconsistent with the concept of province-wide bargaining. In our opinion, an analysis similar to the analysis made in paragraphs 42 to 46 is equally applicable to the determination as to whether the CLAC must seek bargaining rights for all sectors or whether it can acquire rights for only the ICI sector.

50. In the present case, the Sheet Metal Workers have been granted two separate certificates - one confined to the ICI sector while the other certificate relates to all other sectors in Board Area 6. The CLAC has sought to displace the Sheet Metal Workers *only* in respect of its ICI bargaining rights. It would therefore follow that only the sheet metal workers or registered sheet metal apprentices employed in the ICI sector should determine whether the incumbent sheet metal workers retain or lose the bargaining rights they have acquired. In this instance, if Reitzel had employed seven other sheet metal workers or registered sheet metal apprentices (as opposed to the pipe fitters, labourers, etc. referred to in voting constituency #2), but those sheet metal workers had been employed in the residential sector of the construction industry, it would be equally anomalous if, by sheer numerical strength, those seven residential sheet metal workers or registered sheet metal apprentices were able to determine whether or not the sheet metal workers or registered sheet metal apprentices employed in the ICI sector would or would not continue to be represented by the incumbent trade union.

51. We have made the determination that the CLAC can obtain bargaining rights limited to the ICI sector with some hesitation. Our concern is that such a limitation may involve the Board in being required to make sectoral determinations where the CLAC has applied to displace the bargaining rights held by an incumbent A.B.A. or E.B.A. Such sectoral determinations can and inevitably do prolong the certification process in the construction industry. This very problem was identified by the Report Concerning Representations By The Toronto - Central Ontario Building in Construction Trades Council on Bill 204, an act to amend the *Labour Relations Act* (The Adams Report). The problem subsequently led to the amendments to the province-wide bargaining provisions and in particular the enactment of section 144(2) which enables the Board to grant two certificates to an applicant A.B.A. or E.B.A on behalf of all A.B.A.'s without embarking upon a sectoral determination. Notwithstanding this problem we have determined that, when balancing these competing considerations, it is more desirable that in a displacement application employees be able to freely choose which trade union, if any, they wish to have represent them. For these reasons we have determined that the CLAC can, in a displacement application, acquire bargaining rights limited to the ICI sector. The natural result is that the Sheet Metal Workers retain their current bargaining rights to represent all sheet metal workers and sheet metal apprentices in all sectors of the construction industry excluding the ICI sector in Board Area 6. The CLAC has not sought in its application to acquire those bargaining rights.

C. In a displacement application, can the CLAC obtain bargaining rights for the province of Ontario?

52. We have answered this question in the negative. As the CLAC is neither an A.B.A. nor an E.B.A it cannot obtain province-wide bargaining rights by way of an application for certification notwithstanding that such application is a displacement application. In our view to grant the CLAC a province-wide bargaining unit is both inconsistent with the provisions of the Act and is harmful to the fabric of province-wide bargaining as it could lead to a recreation of the types of problems identified by the Franks Report.

53. Prior to the advent of province-wide bargaining the Board would not grant province-wide bargaining rights to any trade union. Normally, Certificates were generally restricted to a specified Board area. The introduction of province-wide bargaining statutorily changed the Board's approach to certifications in the ICI sector of the construction industry, but did so for A.B.A.'s and E.B.A.'s only. The CLAC merely maintained its status-quo and continues to be certified on a Board area basis.

54. Although there are no clear restrictions in section 144(5) which prohibit the CLAC from obtaining province-wide bargaining rights, in our view such a result would be inconsistent with the scheme of province-wide bargaining. As has already been indicated we are of the view that the scheme of province-wide bargaining was a result of a certain quid-pro-quo. Although the E.B.A.'s and the A.B.A.'s were statutorily granted the right or benefit to represent employees and negotiate on a province-wide basis, the "price" paid for this right was the very checks and balances found in the province-wide provisions of the Act. The effect of the designation orders issued pursuant to section 139(1) of the Act, designates the trades which "belong" to each E.B.A and A.B.A. so that E.B.A.'s and A.B.A.'s can *only* represent those employees who are in the trade they have been designated to represent. A two-year province-wide agreement is mandatory. Section 146(2) specifies that there can only be one such province-wide collective agreement. A strike by an E.B.A must include all A.B.A.'s. A lock-out by an employer bargaining agency must be taken by all employers represented by the employer bargaining agency. Both parties to the province-wide agreement are statutorily regulated in respect of ratification and voting procedures. The CLAC is not subject to any of these checks and balances. It has not paid the "price" to obtain province-wide

bargaining rights. Moreover, the possibility of reintroducing intra-trade and intra-regional bargaining rivalries if the CLAC were granted province-wide bargaining rights, notwithstanding that it is not subject to the same checks and balances as the E.B.A's or A.B.A.'s, militates against finding a province-wide unit appropriate.

55. In determining that the CLAC cannot acquire a province-wide bargaining unit we are faced with balancing the competing interest of the parties and the apparently conflicting policies of the Board. There are some troublesome consequences of our determination in this regard. Chief amongst those is that it creates an apparently different approach for terminating the bargaining rights for an incumbent trade union depending on whether the application to terminate the bargaining rights is made by an employee in the bargaining unit pursuant to section 57 and section 123, or whether the application is made by a raiding trade union which seeks to displace the incumbent pursuant to section 144(5).

56. An application for declaration terminating the bargaining rights of the trade union may be made by any of the employees "in the bargaining unit defined in the collective agreement". Applications under section 57 and section 123 involve a claim "for declaration that the trade union no longer represents the employees in the bargaining unit". In applications made pursuant to section 57 which relate to the ICI sector, the Board has previously determined that the "bargaining unit" consists of all employees of the employer employed in the ICI sector of the construction industry in the Province of Ontario. In so doing the Board has rejected the notion that bargaining rights could be terminated for a fragment of what the Act statutorily requires to be treated as a single bargaining unit. Thus, in *Jan Peters Limited*, [1980] OLRB Rep. May 714 at paragraph 4 the Board stated:

The effect of this provision [now section 137 (2)] is to extend by operation of law recognition of the respondent trade union from the counties of Waterloo and Wellington to the whole of the Province of Ontario, that is, to geographic jurisdiction of Local 793, but only for bargaining rights in the industrial, commercial and institutional sector of the construction industry. Since the bargaining unit in the provincial agreement affecting the employer in this case, has been modified by operation of law, we are of the view that the correct bargaining unit for termination purposes in this application is the bargaining unit as amended by section 125(2). [now section 137(2)]. To suggest otherwise would lead to an untenable position. On May 1st, the bargaining rights of the respondent became province-wide for the industrial, commercial and institutional sector of the construction industry. If this Board were to terminate bargaining right for the counties of Waterloo and Wellington, the bargaining right would continue to exist for the remainder of the province and then the new subsection 2 of section 125 [now section 137(2)] would deem those bargaining rights to extend recognition back into the counties of Waterloo and Wellington. Clearly such a result would be to render this application meaningless.

That application as originally framed involved only the termination of the bargaining rights of the craft union in the ICI sector in a bargaining unit limited to employees working within "the regional Municipality of Waterloo and occasionally in the Cities of Guelph, Stratford and Woodstock." By reason of its application of section 125(2) [now section 137(2)] of the Act, the Board acknowledged that it was "changing the scope of this application to include the whole of the province" and went on to direct the vote consistent with that broader "scope". (see also *Clarence H. Graham Construction Limited*, [1982] OLRB Rep. Aug. 1147.)

57. In view of these authorities it is somewhat inconsistent to find that the CLAC can only displace a provincial ICI unit on a Board area basis, while employees in a provincial ICI bargaining unit cannot terminate those provincial ICI bargaining rights on a Board area basis but *must* obtain the support of not less than 45% of the employees of the employer employed in the ICI sector of the construction industry throughout the Province of Ontario.

58. Similarly, in the present case, if the CLAC were to successfully displace the Sheet Metal Workers in Board area 6 only, the bargaining rights of the Sheet Metal Workers in the ICI sector of the constructions industry outside of Board area 6 would be preserved. Employees of Reitzel employed in the ICI sector of the construction industry would thus find themselves represented by one bargaining agent and working pursuant to one collective agreement in Board area 6, while they were represented by another bargaining agent and working pursuant to another collective agreement (the provincial agreement) outside Board area 6.

59. Finally, the natural result which flows from our determination is that, in those instances where an employer employs persons in the ICI sector in more than one Board area on the date of application, the trade union seeking to displace another, need organize only a portion of the employer's workforce. It is precisely that type of undue fragmentation which the displacement policy of the Board seeks to avoid.

60. Notwithstanding these factors however, we have determined that in the present circumstances, the CLAC's acquisition of bargaining rights, ought to be restricted on a Board area basis. In our opinion there are differences between employees terminating the rights of an E.B.A or A.B.A. pursuant to section 57 and section 123, and a trade union terminating those bargaining rights by way of displacement application pursuant to section 144(5). Amongst those differences are the fact that section 137(2) of the Act deems an employer to have recognized all of the A.B.A.'s of an E.B.A. Thus, terminating the bargaining rights of only one A.B.A. would be meaningless as section 137(2) would deem the employer's recognition of all other A.B.A.'s to include, once again that A.B.A. for which bargaining rights have been terminated. Similarly, although it may not be desirable to create a situation whereby employees are represented by one bargaining agent in one Board area and another bargaining agent outside that Board area, that is a result which is not uncommon and which may occur in any event by reason of the time in which ICI province-wide bargaining rights are acquired by an E.B.A or A.B.A.. That result flows from the statutory provisions of the Act and in particular from the concluding words of section 137(2) which indicate that the employer is deemed to have recognised all of the A.B.A.'s to represent employees of the employer employed in the ICI sector in their respective geographic jurisdiction "... *except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights*". In this instance, in the event the CLAC is successful in its application to displace Sheet Metal Workers in the ICI sector in Board Area 6 only, that provision protects the bargaining rights of the designated affiliated bargaining agents representing Sheet Metal Workers or registered sheet metal apprentices in areas other than Board area 6.

61. Finally, in determining the appropriate bargaining unit, the Board is inevitably faced with balancing competing interest and various policy objectives. In doing so, it is not unusual for some violence to be done to some interest or some policy objective. This is particularly true in this instance where the Board is faced not only with balancing the usual interest of the parties appearing before it, but where the Board is also subject to the statutory fetters and parameters imposed upon its discretionary authority by the legislature in the area of province-wide bargaining in the ICI sector of the construction industry. On balance we are of the view that to permit the CLAC to acquire only bargaining rights for sheet metal workers employed in the ICI sector in Board area 6, does the least amount of violence to any Board policy and is consistent with the provisions of the *Labour Relations Act* and in particular those provisions relating to province-wide bargaining in the ICI sector.

62. In the result therefore we find that, in this displacement application, the appropriate bargaining unit is a bargaining unit consisting of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institu-

tional sector of the construction industry in Board Area 6 (the Regional Municipality of Waterloo except that portion of the geographic township of Beverley annexed by North Dumfries Township) save and except non working foremen and persons above the rank of non working foreman. The parties have agreed that Reitzel did not employ any persons outside Board Area 6 on the date of application. The only sheet metal workers employed by the respondent in the ICI sector of the construction industry where those at work in Board Area 6, and where employees who were eligible to vote in voting constituency #1. We therefore direct that only the ballots cast by employees in voting constituency #1 be counted.

1640-87-R International Union of Operating Engineers, Local 793, Applicant v. Ro-Von Construction Limited, Respondent v. Group of Employees, Objectors

Certification - Discussion of onus of proof with respect to whether challenged employees are properly included on a list of employees and whether an employee should be excluded from the operation of the Act because of managerial duties - Two of three working foremen included on list

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *W. Gibson* and *P. V. Grasso*.

APPEARANCES: *Jack J. Slaughter* and *George Palanuk* for the applicant; *Peter Thorup*, *R. W. Paciocco*, *Joanne Santjos*, *Ivan Champagne* and *Ron Champagne* for the respondent; *George Priddle* for the objectors.

DECISION OF THE BOARD; December 19, 1988

1. In this application for certification the Board appointed a Labour Relations Officer to inquire into and report to the Board on (a) the list and composition of the bargaining unit and (b) on the nature of work performed and the duties and responsibilities of any person who is challenged by any of the parties.

2. In the course of meeting with the Labour Relations Officer, the parties entered into minutes of settlement wherein it was agreed that the following persons were not performing bargaining unit work on the date of the application and should be deleted from the list of employees on Schedule "A" and should not appear on Schedule "A":

Dan Tier
Simon McQuabbie
Mike Schoch
Bob Lewis
Larry Parniak
Ronald Walker
Donald Brown
Calvin Raines and
Clifford Smith.

The parties also agreed that Nathalie Bernier was performing bargaining unit work on the date of the application and is properly included on Schedule "A". At the commencement of the hearing

before the Board, the parties further agreed that the following persons were included on Schedule "A":

Richard Gamble
 Danny Dauphenais
 Todd Burch and
 Ken Garside.

The parties agreed at the commencement of the hearing that Brendan Rafter was not included on Schedule "A".

3. At the commencement of argument with respect to the Report of the Labour Relations Officer it was apparent that the following persons were in dispute as to their inclusion or exclusion from Schedule "A":

William Louttit
 Raymond Champagne
 Ralph Aiello
 Garnet Boyer
 Roland Cloutier
 Ronald McClelland
 Ralph Louttit
 Frederick Buetow.

It was the position of the applicant that William Louttit, Raymond Champagne and Ronald McClelland ought not to be included on Schedule "A" primarily because they exercised managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*. It was also the position of the applicant that Ralph Aiello, Garnet Boyer, Roland Cloutier, Ralph Louttit and Frederick Buetow ought not to be included on Schedule "A" because they were not performing bargaining unit work. It was the position of the respondent and the objectors that these eight persons were properly included on Schedule "A" because they performed bargaining unit work and did not exercise managerial functions within the meaning of section 1(3)(b).

4. The Board heard representations with respect to the Report of the Labour Relations Officer dated June 1, 1988. There were quite clearly contradictions and conflicts in the evidence before the Board. In assessing the evidence before it, the Board considers the onus on the parties before it with respect to whether certain employees are properly included on a list of employees and also whether employees are to be excluded from the operation of the *Labour Relations Act* because he or she exercises managerial functions within the meaning of section 1(3)(b) of the Act. The Board has considered the representations of the parties on these points.

5. With respect to whether certain challenged employees are properly included on a list of employees the onus of proof rests with the respondent in an application for certification. In *PHI International Inc.*, [1980] OLRB Rep. Dec. 1789, the Board stated at pages 1795 and 1796 as follows:

21. On an application for certification, the Board is required to ascertain both the number of employees in the bargaining unit employed on the application date, and the number of employees who were members of the union on the "terminal date" fixed pursuant to section 92(2)(j) of the Act. An employer is required to file, in Form 51, a list of his employees. This list must be prepared under the instruction of a responsible company official who signs the list to verify its accuracy. In determining the number of employees in the bargaining unit the Board places primary reliance on this material, for the number and nature of an employer's employment rela-

tionships are matters which are often within its exclusive knowledge. The trade union seldom has detailed information in this regard, even though its right to certification will ultimately turn on establishing majority support among these employees. This is especially so in the construction industry where employment relationships are transitory, employment levels can fluctuate on a day-to-day basis, and an employer may be engaged on a number of independent and geographically separate construction sites. Unless there is an interchange of employees, of functional interdependence among construction sites, the union may not have specific knowledge of the employer's employee complement. In these circumstances, we do not think it is unreasonable to require an employer to come forward and substantiate its claim that certain individuals were, indeed, "employees" on the application date. Frequently, a simple check of the employer's records will be all that is required. Sometimes, it may be necessary to entertain oral evidence. In either case, however, we are satisfied that when an employer submits a list of individuals whom it claims are employees in the bargaining unit on the application date, it must be prepared to come forward, if challenged, and demonstrate that its list is accurate.

6. On the issue of the onus of establishing whether an employee is to be excluded from the operation of the *Labour Relations Act* because he or she exercises managerial functions within the meaning of section 1(3)(b) of the Act, the Board has on several occasions stated that the onus rests with the party which seeks the exclusion. In *York University*, [1975] OLRB Rep. Dec. 945, the Board stated at page 946:

In assessing the duties and responsibilities exercised by persons holding positions of authority the Board is cognizant of the potential for a conflict of interest that may ensue if an employer is denied the exclusive loyalty of the person whose services are the subject matter of dispute. On the other hand, the Board is also mindful that the very design of the Act is to promote collective bargaining amongst employees who fall under the umbrella of its jurisdiction. Because of the "remedial" nature of the legislation the legal onus is placed on the party seeking to exclude a person from the operation of the Act to satisfy the Board of the exercise of managerial functions.

In *Inglis Limited* [1976] OLRB Rep. June 270, the Board expressed its views at page 271 as follows:

4. The Board is empowered under section 1(3)(b) to determine which employees exercise duties and responsibilities requiring, on the one hand that the employer be given their undivided loyalty and on the other that the trade union not be weakened or compromised by their inclusion within its ranks. In the face of the hierarchical structure of many large organizations and the dependency of the more senior persons in the hierarchy on the information and input of "specialists" and functional experts the section can be a most difficult one to apply especially as it pertains to so-called "middle management" and to persons who possess technical expertise. Notwithstanding the overriding concern that there be no conflict of interest the Board must be circumspect in the exercise of this discretion having regard to the fact that those who are declared to be "managerial" are denied access to the collective bargaining process. In view of this "remedial" aspect, therefore the onus is placed on the party seeking to exclude a person from the operation of the Act to satisfy the Board of the exercise of managerial functions. (See *York University* case [1975] OLRB Rep. Dec. 945 wherein reference is made to *Ajax Pickering General Hospital* case [1970] OLRB Rep. Feb. 1283).

See also to the same effect: *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84 at page 87; *Green Gables Manor Incorporated*, [1986] OLRB Rep. May 626 at page 631 and *DRG Inc.*, [1986] OLRB Rep. Sept. 1210 at page 1211.

7. The evidence establishes that William Louttit, Raymond Champagne and Ronald McClelland are employed as foremen and that they wear white hats and are paid hourly rates of \$14.00, \$15.25 and \$15.50 respectively. The issue before the Board is whether or not any of these three exercise managerial functions within the meaning of section 1(3)(b). Typically working foremen in the construction industry are included in the bargaining unit and work with the tools and

equipment. However, on occasions the Board has determined that working foremen do exercise managerial functions. See, for example, *Pre-Con Murray Limited*, [1965] OLRB Rep. Aug. 328.

8. William Louttit is paid \$14.00 an hour and reports to either Ron or Yvon Champagne. He has a company truck and a company credit card but does not have a company telephone calling card. He does not recommend discipline for missing employees and has never recommended that the respondent hire someone. He handles the time sheets of the employees. While he was originally hired as a labourer, he has been a working foreman for about five years. Mr. Louttit spent the majority of his time operating a loader. On the balance of probabilities, the Board finds that, on the date of the making of this application, William Louttit was employed as a working foreman who worked as an operating engineers. In our opinion he does not exercise managerial authority and is therefore included on Schedule "A".

9. Raymond Champagne is paid \$15.25 an hour and was hired as an operator. He is described as a working foreman. He reports to Yvon Champagne and discusses the progress of the job with him. While he can authorize overtime, there was no evidence on the circumstances under which he may do this. When Ronald McClelland has been away due to sickness he has replaced him on the job. He keeps track of the time sheets of the labourers and initials them. Raymond Champagne is responsible for seeing that jobs are fully manned. He has the use of a company truck for company use only and has a company telephone dialing card. He may spend up to one hundred dollars on behalf of the respondent without approval. While he is in charge of a job he spends ninety per cent of his time operating equipment or working as a mechanic-welder. He is described as a working foreman. Raymond Champagne has not recommended that the respondent fire someone and is not responsible for training. He has never recommended that the respondent hire someone and may not change assignments unless he first notifies Yvon Champagne. The Board finds on a reading of all the evidence that Raymond Champagne was employed by the respondent generally and on the date of the making of this application as an operator-mechanic-welder. In addition, the Board finds that he worked as a working foreman and that he did not exercise managerial functions within the meaning of section 1(3)(b). His authority appears to be limited with no appreciable opportunity to exercise independent discretion. Raymond Champagne is therefore included on Schedule "A".

10. Ronald McClelland is paid \$15.50 an hour and is described by several employees who gave evidence as a foreman or a working foreman. One employee even described him as a general foreman. He has effectively recommended that someone be terminated or laid off after speaking to Yvon Champagne. The labourers are "more or less under my control" according to Mr. McClelland. He can grant two hours off for a visit to the dentist and he has the authority to permit employees to go home at lunch time or to go home early. He keeps the time for the flagmen/labourers and checks and initials to see if the time is correct. Labourers initially go to him with any complaint while the operators do not. He has effectively recommended the hiring of employees to Yvon Champagne. Where there is a serious problem he could be contacted and he could relay the problem to Yvon Champagne. MTC representatives would talk to him or Dan Tier. He uses a company credit card for a company truck and machines. He estimates that he spends three quarters of his time operating equipment. The Board finds that by virtue of his effective power to hire and terminate employees and by the exercise of meaningful independent discretion that Mr. McClelland exercises managerial functions within the meaning of section 1(3)(b) even though he spends three quarters of his time operating equipment. In these circumstances, Ronald McClelland is excluded from Schedule "A".

11. The Board finds that Roland Cloutier is employed as an operator and is accordingly properly included on Schedule "A". The Board further finds that Frederick Buetow was employed

for less than half of his time as an operator and is accordingly properly excluded from Schedule "A". The Board also finds that Ralph Aiello operated a packer from time to time, performed lay-out work and engaged in labouring work. The evidence established that on the date of the making of this application Mr. Aiello spent three hours putting out stakes, three hours parking with a vibrator and three hours assisting in the repair of the vibrator. In our view, in these circumstances, it may not be said that Mr. Aiello spent the majority of his time operating a packer on the date of the making of this application because assisting in the repair of a packer does not constitute operating a packer. The Board accordingly finds that Mr. Aiello is not properly included on Schedule "A" and is therefore excluded from Schedule "A". The Board further finds that Garnet Boyer was working as a labourer and not as an operator. Accordingly, Mr. Boyer is excluded from Schedule "A". The Board further finds that Ralph Louttit was not employed as an operator and is accordingly excluded from Schedule "A".

12. The list for the purpose of the count consists of the employees who are properly included on Schedule "A" taking into account the agreements of the parties and the determinations of the Board. The respondent filed a Schedule "D" containing two names as well as a Schedule "A". In applications for certification which are filed under the construction industry provisions of the *Labour Relations Act*, the Board includes for the purpose of the count only those persons who were at work on the date of the filing of this application, namely, September 14, 1987. The two names on Schedule "D" are therefore not included for the purpose of the count. The list for the purpose of the count which has been determined as aforesaid and is now contained on the correct Schedule "A" is as follows:

Rick Barber
 Nathalie Bernier
 Jean Bilodeau
 James Blackburn
 Gerald Bourdage
 Todd Burch
 Gerald Champagne
 Raymond Champagne
 Terry Champagne
 Roland Cloutier
 Danny Dauphinais
 Rheal Dauphinais
 Stephen Fawcett
 Richard Gamble
 Ken Garside
 Gerald Hache
 Robert Kennedy
 William Louttit
 Philip McEwen
 Lorne McGonegal
 Paul McMurray
 Thomas Odber
 Rudy Page
 Nick Parniak
 Leonard Poliquin
 Blair St. Louis
 Joseph Taylor

Edwin Wonch
Melrose Wonch.

13. In this application for certification the applicant filed thirty-one combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership documents, Construction Industry.

14. The applicant filed evidence of membership of the type referred to in paragraph 13 on behalf of 18 of the 29 names on the correct Schedule "A". In addition there was filed documents in opposition to this application for certification. The documents with allowance made for duplicates of signatures contain the signatures of 18 persons whose names appear on the correct Schedule "A". The applicant has field evidence of membership of the type referred to in paragraph 13 on behalf of 9 of the said 18 persons whose signatures have been referred to in this paragraph. In addition further documents were filed which affirmed the wish to be represented by the applicant and requested the Board to disregard any "petition" which the signatories may have signed. The degree of correspondence between the documents in opposition to this application and the "petition" in favour of this application is 2 signatures. Even if the Board were to give weight to the "petition" in favour of this application, there is still a sufficient overlap between the names on the documents in opposition to this application and the names on the evidence of membership filed by the applicant so as to cause the Board to inquire into the origination, preparation and circulation of the documents which were filed in opposition to this application for certification.

15. The Registrar is directed to list this matter for continuation of hearing with respect to the origination, preparation and circulation of the documents filed in opposition to this application, the allegations of improper or irregular conduct, the request for relief under section 8 of the *Labour Relations Act* and any other outstanding issues.

0473-88-OH Grant Elgaard, Complainant v. Sidbec Dosco Inc., Respondent

Health and Safety - Worker refusing to work a job drawing wire without a helper - Worker sent home following work refusal - Safety inspector called following day finding that work not unsafe - Board discussing the two-tiered process of investigation - Board finding that it could not use the safety inspector's report, written after the work refusal, to determine whether the worker objectively believed the work was unsafe - Worker sent home for lack of alternative work and not because he was exercising his statutory rights - No need for Board to determine whether objective test in fact satisfied - Complaint dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members and *G. O. Shamanski* and *K. Davies*.

APPEARANCES: *Raoul Boulakia*, *Grant Elgaard*, *Gordon Falconer*, *Ray Pydych* and *Glenn Pattison* for the complainant; *C. M. McKeown*, *Steve Bray* and *Dale Goldberg* for the respondent.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR AND BOARD MEMBER G. O. SHAMANSKI;
December 7, 1988

1. This is a complaint alleging that the respondent ("Sidbec Dosco") violated section 24 of the Occupational Health and Safety Act (O.H.S.A.) by imposing upon the complainant a penalty because he acted in compliance with the O.H.S.A. and sought the enforcement of the O.H.S.A. when he refused to do particular work which he had reason to believe would endanger himself or another worker. Mr. Elgaard lost four hours wages when he was sent home by Sidbec Dosco after his work refusal. He seeks compensation for the lost wages as well as the removal of any memorandum in respect of the incident from his personnel file.
2. The complainant Mr. Elgaard is employed as a wire drawer at the Sidbec Dosco Etobicoke Works. He has been so employed since May 11th, 1987. Before addressing the events which gave rise to this complaint it is necessary to describe in some detail the job duties and responsibilities of a wire drawer. Simply put, the job of the wire drawer is to reduce the end diameter of a "rod" by means of "pointer" and die block so that the rod ultimately becomes "wire". The rod is drawn through the pointer and die block, is looped around the die block and is ultimately "stripped" off the block and spooled around a "carrier". After the carrier is full and the drawing process has completed its cycle, the carrier is taken off the machine and transported to shipping for ultimate distribution to the customer.
3. The first part of this wire drawing procedure is referred to as "stringing and pointing" the rod. The wire drawer is required to grasp the end of the rod, and manoeuvre and thrust the rod end into the groove of the pointer. This procedure takes approximately five minutes. There is some danger and risk of injury associated with this procedure. The wire drawer risks strain, especially back strain, from pulling, pushing, manoeuvring and otherwise trying to straighten the rod into the groove of the pointer. If the wire drawer is unable to control the rod and it slips from his grasp, the rod could spring back and strike the employee. Similarly, there is some danger and risk of injury associated with the last part of the procedure wherein the wire drawer is required to "tie down" the bottom end of the wire on the carrier. As the machine nears the completion of its cycle and the rod is almost at its end through the die blocks, the machine is stopped so that the wire on the carrier can be tied down before the carrier is taken off the machine. Failure to stop the machine or properly tie down the wire would result in the wire spinning (or as the complainant stated "whipping") off the carrier into the air with the resultant risk of hitting and injuring nearby employees.
4. Sidbec Dosco manufactures numerous different types of wire of various gauges and with different carbon contents. Wire that has a thick gauge is more difficult or cumbersome to draw. For this reason the company has an established policy that if the gauge of the finished wire is .500 or more, a "helper" will be assigned to assist the wire drawer.
5. Similarly, rod (and therefore the wire that is ultimately drawn) that has a high carbon content is harder and is therefore more difficult to manoeuvre and handle. A high carbon content rod is physically tougher to work with, especially during the stringing and pointing part of the wire drawing process. Moreover, the hardness and firmness of the high carbon content rod makes it impossible for the wire drawer to weld one end of the rod onto the next so that the run is continuous. The weld does not hold. It is therefore necessary to string and point each rod at the commencement of each cycle. Typically, it takes approximately 40 to 45 minutes for the machine to run, so that in a usual 8-hour shift, if the wire drawer was required to run only high carbon content rod, he/she would have to point and string approximately 6 or 7 rods.

6. The events which gave rise to this complaint arose when Mr. Elgaard refused to run an order which required a high carbon content rod. The order was identified as running .375:1541 wire. An order for .375:1541 wire is an unusual order seldom run in the plant. From the totality of the evidence we conclude that .375:1541 rod is particularly difficult to handle. We heard much evidence about whether it was or was not either a policy or practice of the company to provide a helper when the wire drawer was running 1541 rod. Both Mr. Elgaard and Mr. Pattison, another wire drawer at Sidbec Dosco, testified that it had been their experience that, (with the exception of one occasion in Mr. Pattison's case) a "helper" had always been assigned to assist the wire drawer who is running 1541 rod. They were of the opinion that this was company policy. Both further testified that the "helper" would help in the difficult pointing and stringing procedure, and would also assist in tying down the wire before the carrier was taken from the machine. Foremen and other managerial personnel called on behalf of the respondent company however stated that Sidbec Dosco does not have a policy of assigning a "helper" to assist the wire drawer running 1541 rod. If 1541 rod was being run and the wire drawer required assistance however, he was free to ask another employee to help out for the five minutes involved in the "pointing and stringing" procedure. Asking either a general labourer or another wire drawer is not unusual and is encouraged. There is a difference however between asking another employee for temporary assistance and having a "helper" assigned. The "helper" remains with the wire drawer and assists him for the entire shift, or at least until the order for the difficult wire (either over .500 gauge or as Mr. Elgaard testified 1541 carbon content) had been completed. Another employee who merely helps out is expected to return to his own duties after rendering the assistance.

7. Whether or not the company did or did not have an established policy of assigning a "helper" where 1541 rod is run is not determinative of the issues with which we are faced. The presence or absence of such a policy does not necessarily mean that running 1541 rod without a "helper" is either safe or unsafe. The presence or absence of such a policy, and more importantly the workers' knowledge or belief in the existence of such a policy for safety reasons, are relevant considerations in determining whether the worker had "reason to believe" or "reasonable grounds to believe" that the work would endanger himself or another worker.

8. Having thus set out the relevant facts and circumstances surrounding this complaint we now turn to examine the events of the night shift on May 2nd, 1988. In determining what transpired that night we were faced with the varying and at times contradictory evidence of Mr. Elgaard and his supervisor Mr. Mullett. Each man gave a different version of the events and conversation that occurred that night. On balance and having regard to the usual factors, we prefer the evidence of Mr. Mullett. Thus, where there was a conflict in the testimony between Mr. Mullett and Mr. Elgaard we have preferred the evidence of Mr. Mullett.

9. When Mr. Elgaard commenced work on the 12:00 a.m. to 8:00 a.m. shift on May 2nd, he was initially assigned to run wire with the finished gauge of .400. Mr. Elgaard did not have a "helper" assigned to help run this order. The running of that order finished at approximately 3:00 a.m. Thereafter, Mr. Elgaard was assigned to run a new order. Unfortunately, because the finish of the raw material required for that order was below quality, the order could not be run. Mr. Mullett discontinued the order and instead gave to Mr. Elgaard an order for .375:1541 wire. Mr. Elgaard did not request a "helper" when he obtained that order from Mr. Mullett.

10. Upon receipt of the order Mr. Elgaard proceeded with the normal and usual procedures. As a change-over required new dies he got the dies from the die room. While starting the set up, Mr. Elgaard wondered why he had not yet been assigned a "helper". He indicated that he was expecting a "helper" and assumed the "helper" was on the way. Notwithstanding Mr. Elgaard's earlier testimony that he had been taught to point and string 1541 rod only with the assis-

tance of a "helper", notwithstanding his evidence that it was his understanding that it was dangerous and unsafe to string and point 1541 rod without a "helper", and despite his professed knowledge of an earlier accident in which his predecessor had been "clobbered in the head" because he had attempted to string and point 1541 rod without a "helper", Mr. Elgaard started and in fact completed the stringing and pointing of the 1541 rod without a "helper". After completing this procedure however, he "basically said to [himself] this is bull, I need a "helper" and proceeded to Mr. Mullett's office. Mr. Elgaard testified that he went to ask for a "helper" because he expected one as that had been his experience running 1541 rod, and because, as he was wrestling with the rod it became patently clear to him that he needed a "helper". He also told the Board the job was "too tough to work with on [my] own". He went to his foreman to inquire who was going to be sent as a "helper".

11. At some time between 3:00 and 3:30 a.m. Mr. Elgaard went into the wire mill office and said to Mr. Mullett that he needed a "helper". Mr. Mullett advised him that it was not company policy to assign a "helper" where the finished gauge was under .500. There was some discussion between the two men about the company practice with Mr. Elgaard stating that the company always assigns a "helper" when 1541 rod was being run and that he had been advised by fellow employees that a "helper" was required for 1541 rod, and Mr. Mullett maintaining his position that company policy and practice did not indicate that a "helper" was necessary in the circumstances. At some point during this conversation Mr. Elgaard indicated to Mr. Mullett that if Mr. Mullett did not provide him with a "helper" he, Mr. Elgaard, would claim the job was unsafe and refuse to perform the work.

12. When Mr. Elgaard stated that he would claim the work was not safe Mr. Mullett asked him to explain what was unsafe about the job. Mr. Elgaard was unable to explain why the job was unsafe while in the wire mill office. Thereafter the two men went to the wire drawing machinery and Mr. Mullett once again requested Mr. Elgaard to explain or show to him what part of the job or the machine was unsafe. Again, Mr. Elgaard was unable to indicate or inform Mr. Mullett why the job or the machine was unsafe. He was unable to either explain or show to Mr. Mullett his concerns.

13. When Mr. Elgaard was unable to articulate the precise nature of his safety concerns to Mr. Mullett, and after he was unable to show Mr. Mullett what was unsafe about the job or the machinery, Mr. Wayne Ranco, the union steward, was asked to join the discussion. The matter was explained to Mr. Ranco who was then asked by Mr. Mullett if he could see any safety problems. Mr. Mullett asked Mr. Ranco to review the situation as he thought it was possible that he, Mr. Mullett, might have missed something. According to Mr. Mullett, Mr. Ranco reviewed the situation and opined that he could not see any safety concerns. Mr. Mullett told Mr. Ranco to ask Mr. Elgaard what the nature of his safety concern was. According to Mr. Mullett, Mr. Elgaard was unable to explain his concerns to Mr. Ranco. Mr. Mullett testified that thereafter, Mr. Ranco advised Mr. Elgaard to start the machine and do his job.

14. According to Mr. Elgaard however, he discussed the matter with Mr. Ranco, explained that he felt the job was unsafe and was told by Mr. Ranco that he, Mr. Ranco could not advise Mr. Elgaard whether the job was unsafe or not. Mr. Elgaard testified that Mr. Ranco indicated to him that the decision as to whether he should refuse the work or not was left strictly up to him. Neither party chose to call Mr. Ranco as a witness.

15. After Mr. Ranco left, Mr. Elgaard and Mr. Mullett continued their discussions about whether it was company policy to assign a "helper" for the running of 1541 rod, and who had the right to make the ultimate decision on whether the work was safe or not. During these discussions

reference was also made by Mr. Elgaard to a situation which had occurred in the previous week. On that occasion two wire drawers had been asked to run three machines (an increase in their normal complement) and Mr. Elgaard advised Mr. Mullett that those wire drawers had received criticism from their fellow workers and their union for doing this. Mr. Elgaard stated that *part* of the reason he did not want to run the machine without a “helper” was to avoid exposure to similar criticism from his fellow employees. Mr. Mullett advised Mr. Elgaard that the circumstances of that situation involved different issues and was inapplicable to the situation at hand.

16. Thereafter, the two men returned to Mr. Mullett’s office. Further discussions ensued. Mr. Mullett instructed Mr. Elgaard to run his machine and if he encountered any problems with the union they would be discussed in the morning. Mr. Elgaard again refused to perform the work but offered to do any other work or run any other order. Mr. Mullett indicated that there was no other work available. Mr. Elgaard punched out at approximately 4:00 a.m. He was not paid for the remaining 4 hours of his shift. No discipline was taken and no disciplinary memorandum was placed in his personnel file.

17. Neither Mr. Mullett nor Mr. Elgaard called a safety inspector after Mr. Elgaard’s continued work refusal or after he was sent home. Mr. Mullett did advise the day shift foreman, Mr. Jewkes, of the events that had taken place. Mr. Jewkes advised the day shift wire drawer of the work refusal and advised him he could refuse to do the work if he felt it was unsafe. The day shift wire drawer apparently did not consider the work or machine to be unsafe as he started up the machine as requested. This wire drawer did however indicate the work was “hard” but was content when Mr. Jewkes proposed to have a labourer help him, as required, for the brief period of time it took to string and point the rod. The .375:1541 order was completed that day. Mr. Elgaard returned to work as scheduled that night and ran a different order.

18. The work refusal was also brought to the attention of Karl Swierkot, the safety and training supervisor at the plant. Mr. Swierkot brought the matter to the attention of Mr. Felix Mifsud, the alternate member of the joint O.H. & S.C. who represents workers. The usual members of the committee who represent workers are Mr. Gord Falconer and Mr. Ray Pydych. They were not at work that day. Mr. Mifsud asked Mr. Swierkot to defer further deliberations until Messrs. Falconer and Pydych returned. On May 3rd, Mr. Swierkot discussed the matter with Mr. Falconer. Mr. Falconer told Mr. Swierkot that he did not feel that the investigation had been completed. Mr. Swierkot took the contrary view. In order to resolve this difference of opinion it was determined to call the Ministry of Labour and notify an inspector of the situation. An inspector attended on May 3rd.

19. In addition, on May 4th, there was a meeting of the joint O.H. & S.C. to “resolve the work refusal”. Both Mr. Mullett and Mr. Elgaard attended that meeting. Minutes of the meeting were maintained. They were signed by Mr. Swierkot and Mr. Falconer. Mr. Swierkot testified that the minutes accurately reflected the matters that were discussed, and the agreement reached by the participants at that meeting. When asked whether Mr. Falconer agreed with the minutes, Mr. Swierkot responded that he had or else he would not have signed the minutes. Mr. Falconer is the local union president as well as a member of the joint O.H. & S.C. He was present throughout this hearing and could have been called as a witness if his recollection of the events was different, or if he had not in fact signified his agreement to the minutes by affixing his signature. He was not called. The minutes of the meeting substantially corroborate Mr. Mullett’s testimony. The minutes also support Mr. Mullett’s position that it was not company practice to provide a helper when a wire drawer was running 1541 rod in- so far as the minutes contain a specific resolution that “the procedure for running 1541 rod will be *modified* to include the phrase “a co-worker can be used for assistance during pointing and stringing” [my emphasis]. Such “modification would have been

redundant and unnecessary if in fact the practice *was* to provide a “helper” with the running of 1541 rod.

20. Within this factual framework we now turn to examine the law and the submissions of the parties. Counsel for the respondent submitted that this was not an O.H.S.A. matter, and that Mr. Elgaard did not raise a safety issue but rather a crewing or manning issue which should have been dealt with under the collective agreement after application of the “work now grieve later rule”. In the alternative counsel submitted that if this Board did find Mr. Elgaard to have raised a safety concern when he refused the work, the company acted properly, investigated and sent Mr. Elgaard home because there was no reasonable alternative work available. Counsel on behalf of the complainant submitted that Mr. Elgaard had properly exercised his rights under the Act, had sought the enforcement of the Act and had been sent home contrary to the provisions of section 23 and section 24. Counsel submitted that the company had not properly investigated the matter and had sent home Mr. Elgaard before the investigation was completed contrary to section 23(5) of the Act.

21. The relevant provisions of the O.H.S.A. are found in sections 23 and 24. Before we examine those, we note that the fundamental premise of the O.H.S.A. is that occupational health and safety is a common responsibility of both the employer and the employees and, where prescribed in the Act, the trade union representing employees. In order to achieve a workplace free of occupational health and safety hazards, the employer, the employee and in appropriate cases the trade union, are charged with the task of identifying, assessing and ultimately resolving health and safety hazards in the workplace. To this end the O.H.S.A. establishes an internal responsibility system in the joint O.H. & S.C. The concept of internal, mutual responsibility is recognized in the process established in section 23 of the Act.

22. The formal process set up in section 23 consists of a number of steps. The process established has been referred to as a two-tiered process in reference to the fact that there are two levels of investigation - the first level of investigation is conducted by the employer, while the second tier of the process is the investigation by the inspector from the Ministry of Labour. There are however other steps or stages to the process.

23. *Before* the first tier of the investigation the employee must “promptly report the circumstances of his refusal”. Thereafter, the employer or supervisor shall “forthwith investigate the report”. Such investigation must be in the presence of the worker and, if there is such a person, a member of the Health & Safety Committee, a health and safety representative or a union representative. After the employer has investigated or taken steps “to deal with the circumstances that caused the worker to refuse to work”, the worker may continue to refuse to do the work if he continues to have “reasonable grounds to believe” that the work is unsafe. In such instances the employer or the worker (or a person on behalf of the employer or the worker) *shall* cause an inspector to be notified. “Pending” the investigation and decision of the inspector, the employer must assign the worker reasonable alternative work or where none is practicable give to the worker “other directions”. Such other directions must not violate section 24.

24. Several cases have considered the rationale for the process established in section 23. In *International Harvester Company of Canada Limited*, [1983] OLRB Rep. June 898 the Board addressed the matter as follows:

23. Section 23 sets out a code of conduct for employees and employers where employees have reasonable concerns about hazards to their health and safety in their work places and their employers disagree. First of all, employees can refuse to work but must report the circumstances of their refusal to their supervisors. Section 23 provides for a two-tiered investigation - initially

by the employer immediately upon receiving the employee's report, and subsequently by Ministry of Labour inspectors after a continuation of the refusal. While the first tier occurs, the refusing employee must remain at a safe place near his work station (subsection 5) except, presumably, when his presence during the investigation requires something else (subsection 4). The employer, during this time, is given no right to assign alternate work, presumably because this would interfere with the employee's presence at the investigation and because the time taken up in the investigation is totally within the control of the employer. If after this investigation, the employee continues to refuse to work because he has reason to believe his work or work place puts his safety in jeopardy and the employer continues to disagree with the employee's belief, then the inspectors from the Ministry must be called in. Pending this second-tier investigation, the employer can either assign "reasonable alternative work" or, where none is practicable, "other directions" which do not violate section 24. These options were made available at this stage presumably because the inspection might not get underway immediately and its duration, up to and including the inspectors' decision, is not fully within the employer's control. Once the inspector commences the investigation, it must proceed in the presence of the refusing employee (subsection 7). Therefore, while the employee (who continues to refuse after the first-tier investigation) may be directed to do other work or be given any other lawful direction prior to the commencement of the investigation or after its conclusion, he retains the right to participate in the investigation itself.

24. Section 24 ensures that an employee who properly seeks to utilize or has utilized section 23 is not interfered with through dismissal, suspension or other discipline, threats of dismissal, suspension or other discipline, penalties or intimidation because he/she is acting in accordance with the Act. It is important to note that section 24 does not provide remedies for failure to follow the procedures of section 23. Section 37 does. It provides that:

37.-(1) Every person who contravenes or fails to comply with,

- (a) a provision of this Act or the regulations:
- (b) an order or requirement of an inspector or a Director; or
- (c) an order of the Minister,

is guilty of an offence and on conviction is liable to a fine of not more than \$ 25,000 or to imprisonment for a term of not more than twelve months, or to both.

(See, for example, *R v Algoma Steel Corporation Limited*, (unreported), released January March 1981, Greco Prov. Ct. J.). It provides that a person who contravenes or fails to comply with the Act is subject to a summary conviction punishable with fine and/or imprisonment. Our jurisdiction is not to remedy breaches of the Act (in particular section 23) but, rather, to determine whether section 24 has been violated. Similarly, proving section 23 has not been followed will not result in a finding that section 24 was violated. Proof that the procedures of section 23 were not followed, however, could be an ingredient in a determination that section 24 has been breached. A failure to follow the steps set out in section 23 would have to be explained and that explanation weighed with all the other evidence to assess whether section 24 had been violated.

25. Between the initial work refusal and the decision of the inspector, the refusing employee and the employer are essentially locked in a contest of persuasion. Each must assess the situation and make difficult judgement calls. If at any time the employer correctly assesses the employee's beliefs as unreasonable, the full range of disciplinary action is available and this Board will not have any jurisdiction to interfere. Since employees only have the protection of the Act in circumstances where they can show their beliefs were reasonable, the Act provides for the employee's participation in both tiers of investigations.

25. Underlying this two-tiered investigation process is the fact that the worker must "promptly report the circumstances of his/her refusal". The starting point of the tier-one investigative process is the refusal of work by the worker and his/her concurrent report of that refusal to the employer. The worker must explain to his/her supervisor or employer that he/she believes that what he/she has been asked to do is unsafe. The rationale for this "report" is clear. The employee must explain why he/she is refusing

the work so that the employer can “investigate”, assess and analyse the situation and act accordingly - by either rectifying the danger of which the employer has been made aware or by advising the employee of the facts, reasons and circumstances which have led the employer to conclude that the work is not a danger to either the employee or another worker.

26. Discussions on the plant floor revolving around safety issues should not be adversarial. The step preceding the tier-one investigation is obviously a step designed to resolve perceived safety problems in an expeditious fashion. The step contemplates a fruitful dialogue between the parties in which the employee “reports”, i.e. advises, informs and explains to the employer the circumstances which have caused him to refuse to do the work.

27. The character or quality of that “report” will often have a direct impact upon the character or quality of the investigation carried out by the employer or supervisor. The employer or supervisor is charged with the responsibility of forthwith investigating “the report”. Given the purpose of the O.H.S.A. and of section 23 it is obvious that good faith, open, free and frank communication between the parties at the very start of the process is necessary.

28. Although we acknowledge that the quality of the report may affect this Board’s assessment of the employer’s actions taken in response to the report, we do not wish to be taken to say that a complainant’s right to raise safety issues is somehow dependent upon his eloquence. Initially, at the stage preceding the tier-one investigation by the employer or supervisor, whether or not an employee can articulate his/her safety concerns with the degree of precision or clarity which management needs or desires should not be in issue. The employer or supervisor should not discount an employee’s safety concerns merely because the employee lacks communicative skills. Whether an employee does or does not have adequate verbal skills, whether he can or cannot articulate concerns in a clear, precise, or intelligent fashion, does not affect management’s responsibility to investigate the concern. It is sufficient for the employee to say, as Mr. Elgaard did in this case, “I am refusing to do the work because I believe it is unsafe”, and thereby require the employer or supervisor to investigate the circumstances giving rise to the work refusal.

29. The Board has long held that, initially, the test to be employed in determining whether an employee has reason to believe work is unsafe is a subjective test (see, for example the *Corporation of the City of Ottawa* [1986] OLRB Rep. June 798, and *Domtar Inc.*, [1988] OLRB Rep. August 780). The reason for such a subjective test is obvious. Safety of life and limb is important. Thus, where a safety concern is raised it should be investigated.

30. In this case we have some doubt that Mr. Elgaard had reason to believe the work in question was unsafe. Mr. Elgaard professed to be very safety-conscious, stating in cross-examination that he took a very personal interest in his own safety as well as being conscious of the general safety of his fellow employees. Mr. Elgaard’s safety-consciousness extends to being familiar with the safety of his work environment and to bringing safety matters to the attention of management. By his own admission he estimates that he raises safety concerns regularly, perhaps once a month. Mr. Mullett estimated the frequency with which Mr. Elgaard brought safety matters to the attention of management to be “quite often”. While testifying, Mr. Elgaard was very articulate and exhibited both strong communicative skills and a fine command of the English language. Notwithstanding these factors, Mr. Elgaard was unable to articulate in any meaningful way his safety concerns to Mr. Mullett on the night shift of May 2nd. He did not say why he felt it was unsafe to run 1541 rod without a “helper”, did not mention the risk of injury that could occur if the 1541 rod slipped from his grasp while he was pointing the rod, nor did he refer at all to the assistance the “helper” could render in tying down the wire on the carrier. Similarly, although Mr. Elgaard testified that he knew of the injury sustained by another employee who was “clobbered in the head”

when he tried to string and point 1541 rod without a “helper”, he did not refer to this accident when he attempted to discuss his safety concerns with Mr. Mullett that night. Finally, it is difficult to accept Mr. Elgaard’s safety-consciousness on that night in light of the fact that he knowingly performed what he considered to be an unsafe act when he strung and pointed the rod *before* asking his supervisor for a “helper”.

31. However, having observed Mr. Elgaard while he testified, and after considering the totality of the evidence, and all of the circumstances, we are satisfied on balance that Mr. Elgaard held the belief that the work was unsafe to perform without the assistance of a helper. In so doing we are particularly cognizant of the fact that, although he had already performed one of the “unsafe” acts (when he strung and pointed the rod without a “helper”), when Mr. Elgaard first approached the supervisor he was aware that over the course of the remainder of his shift he would be required to string and point the rod another three or more times. We therefore find that Mr. Elgaard has met the subjective test which precedes the tier-one investigation. He has fulfilled the first pre-condition of establishing his entitlement under section 23 in-so-far as he communicated to his supervisor a belief that he was or would be, or a fellow worker was or could be, endangered if he performed the particular work to which he had been assigned.

32. Faced with a work refusal, the supervisor is required to investigate forthwith in the manner set out in section 23. This Mr. Mullett did do. Mr. Mullett considered “the report” of Mr. Elgaard and before commencing his investigation asked Mr. Elgaard to clarify and explain why he felt the work was unsafe. Mr. Elgaard was unable to do so. Section 23(4) requires the initial investigation to be conducted in the presence of the worker *and, if there is such*, one of three individuals referred to in that section. Mr. Mullett continued his investigation by examining the machinery on the plant floor. Mr. Mullett did this in the presence of Mr. Elgaard and Mr. Ranco, a union steward who falls within the ambit of paragraph 23(4)(c). (Neither a committee member who represents workers or a Health & Safety representative was present or working that night.)

33. After Mr. Mullett had completed his investigation he was of the opinion that the work was not unsafe. He communicated that view to Mr. Elgaard. Once again, at this stage, the O.H.S.A contemplates some dialogue between the participants. A thorough airing of the facts and circumstances and remedial action taken by the supervisor if necessary, can often eliminate, or at the very least allay an employee’s fears and apprehensions. Had better communications occurred between Mr. Elgaard and Mr. Mullett on May 2nd, it is entirely likely that this matter would not have escalated as it did. With better communication the matter would probably have been resolved.

34. The facts and circumstances of this case raise the issue of what is meant by the word “investigate” in the phrase “shall forthwith investigate” in section 23(4) of the O.H.S.A.. What is envisioned by such an investigation? When can it be said that the investigation is complete? Significant ramifications flow from the finding that the investigation envisioned in section 23(4) has in fact been completed. Once it has been completed, and before the inspector’s inspection begins, the employer is free to assign other work to the employee or give other directions if reasonable alternative work is not available. “Other directions” include sending an employee home without pay provided such actions are not taken as a reprisal of penalty against the worker *because* he exercised his rights under the Act. (See *International Harvester, supra.*) Before the completion of the investigation however, the employer does not have these options available. The employee must remain near his work station and consequently continues to be paid.

35. A cursory investigation by a supervisor advised of a work refusal for safety reasons is obviously not sufficient to discharge the employer’s or supervisor’s obligations pursuant to section

23(4). A hasty, superficial examination of the circumstances without any attention to details with the resultant conclusion that “in my opinion the work is safe” is not sufficient under the O.H.S.A. The very use of the word “investigate” suggests a careful tracking down of facts, a process whereby one looks over something or tests it carefully to learn facts, and suggests a search that is conducted by asking questions and obtaining answers. All of these things Mr. Mullett did. Moreover, the employer’s investigation must be measured or examined in the context of the report received and the circumstances that existed at the time. In this case the report received by Mr. Mullett consisted essentially solely of the statements “I need a helper, the work is unsafe”. Under the circumstances, and given the limited information with which Mr. Mullett had to work, we fail to see what other steps he could have taken to investigate the matter, remedy the situation or deal with the circumstances. In cross-examination Mr. Elgaard himself was unable to state what other actions Mr. Mullett could or should have taken. In the circumstances of this case we have no hesitation in finding that Mr. Mullett completed his investigation, and that the “investigation” carried out by Mr. Mullett amounted to the kind of investigation which triggers the objective test set out in section 23(6).

36. This then brings us to the issue as to whether Mr. Elgaard had “reasonable grounds” to believe the work continued to be unsafe. In many cases the Board has held that this subsequent test is an objective one and has adopted the enunciation of the following test set out in *Inco Metals Company*, [1980] OLRB Rep. July 981 at paragraph 59 - (a case dealing with the predecessor legislation):

... This Board must ask itself whether the average employee at the workplace, having regard to his general training and experience, would, exercise a normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee.

See also *Camco Inc.*, [1985] OLRB Rep. Oct. 1431 and *Corporation of the City of Ottawa*, [1986] OLRB Rep. June 798. The premise of the objective test in section 23(6) is that the investigation (including good faith dialogue or any steps taken to deal with the circumstances or take remedial actions where necessary) will likely have eliminated the source of the employee’s fears. The test as to the reasonableness of the employee’s belief becomes more onerous *because* of the dialogue, investigation and remedial action which has preceded it.

37. Before addressing the objective standard test which follows the employer or supervisors initial tier-one investigation, and which precedes the Ministry of Labour investigators’ investigation, we wish to address two interrelated matters raised in this case. First, what if any, is the effect of the fact that subsequent investigations and discussions by the joint O.H. & S.C. and the investigator have shown that the work was not unsafe. Secondly, what use, if any, can be made of the report of the investigator and the minutes of the joint O.H. & S.C. both of which post-date the work refusal.

38. In this case, counsel on behalf of Sidbec Dosco submitted that it was significant that both the joint O.H. & S.C. and the inspector concluded that the work which Mr. Elgaard was requested to do was safe. Counsel submitted that the reports of the joint O.H. & S.C. and the inspector could be “rolled back” through the tier-two investigation to the tier-one investigation. The essence of the submission was that these subsequently written documents could be used by the Board to substantiate the company’s view that this was not a safety matter and presumably to assess the “reasonableness” of the complainant’s belief.

39. We have already commented that, at the initial stage of the work refusal, the employee need meet only the subjective test that he believed the work to be unsafe. In our view, the subse-

quent reports of the joint O.H. & S.C. and the inspector can have no effect or impact upon our assessment as to whether this subjective test has been met.

40. Past decisions of the Board have indicated that at no stage of the proceedings must an employee be proved correct regarding the safety of the work and his consequent work refusal. Generally the Board looks only to the reasonableness of the employee's views in light of the information available to the worker at the time. In *Inco Metals, supra*, the matter was put as follows:

60. The ability of an employee to invoke the right to refuse work does not depend on whether there is in fact danger. The question is whether at the time an employee refuses to perform his work he has reasonable cause to believe that it is unsafe to do so. The fact that it may later be shown that there was no real danger at the time an employee refuse the work doesn't mean that the employee was wrong in exercising his right under the Act. The events must be assessed in the light of knowledge available at the time that the employee refused to work.

See also *Imperial Oil Limited*, [1982] OLRB Rep. Apr. 580; *Wilco Canada Inc.*, [1983] OLRB Reports Oct. 1759 and *Domtar Inc.*, *supra*.

41. Thus, if Mr. Elgaard had continued to refuse to run 1541 rod without a "helper" in the face of the reports of the inspector and the joint O.H. & S.C. it might not be possible for him to satisfy the Board that at the time of his continued refusal he reasonably believed that the work was unsafe. However that is not the issue. The issue to be determined is whether we can use the safety inspector's report and the joint O.H. & S.C. report, both written after the work refusal, to assess whether, viewed objectively, Mr. Elgaard had a reasonable belief the work was not safe at the time he refused to perform the work and after the employer had investigated his initial work refusal.

42. In the circumstances of this case we think not. We concur with the general view that our assessment of the objective reasonableness of the employee's belief ought to be based on the information available to the worker at the time. Where an inspector's report or expert opinion is known to the complainant, this knowledge at the time of the complainant's work refusal is one of the circumstances which the Board will consider in assessing the objective reasonableness of the employee's belief.

43. Similarly, we concur with the previous decisions of this Board which have determined that our role is to decide whether section 24 of the Act has been violated. Our role is not to determine whether running 1541 rod without a "helper" was in fact safe or not safe. Rather our role is to determine whether Mr. Elgaard was sent home *because* he had acted in compliance with the O.H.S.A. or sought the enforcement of the O.H.S.A. (See, for example, *Commonwealth Construction Company*, [1987], OLRB Rep. July 961, at page 969.) Given that our role is not to determine if in fact circumstances are safe or not, it is irrelevant that subsequent events have proved the company correctly assessed the situation at the time of the refusal. It is not a defence for the employer to say "we were right on the safety issue and therefore we were right to send the worker home, when he refused the work". One does not always or necessarily flow from the other.

44. We return then to consider whether, applying the objective test, Mr. Elgaard had reasonable grounds to continue to believe the work was unsafe following the supervisor's investigation. It is the position of complainant's counsel that in fact section 23(6) was never triggered in this instance because the company failed to complete its investigation. As has been indicated however, we have concluded that Mr. Mullett conducted and completed a proper investigation in light of all of the circumstances, including the lack of specificity or particularity of Mr. Elgaard's complaint.

45. That is not to say that the supervisor's response to the complaint, and the nature of his investigation will not be considered as one of the circumstances, or one of the pieces of informa-

tion or knowledge in the employee's mind at the conclusion of the tier-one investigation. Just as the character and quality of the worker's report will have a direct impact upon the character or quality of the investigation, so the very character or quality of the investigation will also have an impact upon the Board's jurisdiction to determine whether the worker had "reasonable grounds" to continue to believe the work to be unsafe.

46. In the present case, we have concluded that Mr. Elgaard was sent home midway through the shift because of a lack of available alternative work. We are satisfied, on the totality of the evidence that Mr. Elgaard was not sent home because his employer or supervisor sought to discipline him, impose a penalty or intimidate or coerce him because he exercised his rights under the O.H.S.A. In light of these conclusions we need not determine whether, in fact, the objective test has been satisfied. In the circumstances of this case, concluding that the objective test had been met would not have disposed of this matter.

47. Pursuant to section 23(6), if the worker continues to refuse to perform the work to which he has been assigned following the investigation, "the employer or the worker or person on behalf of the employer or worker *shall* cause an inspector to be notified." "Pending" the investigation and decision of the inspector, the employer must "assign the worker reasonable alternative work" or "where an assignment of reasonable alternative work is not practicable", the employer may "give other directions to the worker". Previous cases have held that "other directions" in section 23(10) include directing the employee home where no alternative work is available. (See for example *International Harvester, supra* at page 912). In the present case, neither the employer nor the worker (or a person on behalf of the employer or the worker) caused an inspector to be notified until some time on May 3rd. Then the inspector was called not necessarily to investigate the situation of the work refusal, but rather to resolve an issue between the employer and the joint O.H. & S.C. employee representative as to whether the tier-one investigation had been completed.

48. As has already been indicated herein, we are charged with the responsibility of determining whether section 24 has been breached. Except to the extent that it assists us in fulfilling our function under section 24, it is not within our jurisdiction to determine whether section 23 has been followed or violated. We do not have any general jurisdiction to determine whether an employer, employee or other person has failed to discharge their obligations under section 23 of the O.H.S.A. As was stated in *Dowty Equipment of Canada Limited*, [1983] OLRB Rep. Sept. 1451 at p. 1455:

... But as the Board pointed out in *International Harvester, supra*, the failure to follow the section 23 procedure will not result in a finding that section 24 has been violated, although that failure would be a factor in determining whether section 24 had been breached.

49. The fact that there has been a breach of the procedure set out in section 23 is not determinative of this matter. Rather, we have considered the status of the situation as it existed at the time when the inspector should have been called but was not in fact called. There was no suggestion that Sidbec Dosco's normal or usual response to a lack of work situation was anything other than to send employees home. This response is obviously subject to the seniority and lay-off provisions in the collective agreement. In the present case neither party introduced any direct evidence about either the provisions of the collective agreement or the employer's usual or normal response to a lack of work situation. If sending employees home in situations where there was insufficient work had not been a normal response of this employer, we would assume that one of the parties would have led some evidence to the contrary. The question to be answered therefore remains - was Mr. Elgaard sent home *because* he had acted in compliance with the O.H.S.A., or because there was no alternative work available?

50. In the circumstances of this case, and in light of all the evidence, we are satisfied that there was no other work available that night. Although Mr. Elgaard testified that there were orders in the office, and machines #5 and #7 were not running, we accept Mr. Mullett's evidence that he did not have the necessary raw material to run another alternative order that night. Mr. Mullett testified that he specifically checked to see if another order could be run instead of the .375:1541 order. Indeed, he apologized to Mr. Elgaard when alternative work could not be found and Mr. Elgaard was sent home. Mr. Mullett was frank in his admission that there could have been "orders in the slots" but testified that the raw material, "the rod", was not clean or ready, on site in the plant. This is entirely consistent with his evidence that he orders the rod required for the day shift during the night shift just as the foreman of the evening shift orders the rod or stock required for the midnight shift. The evening shift foreman could not have anticipated the poor quality of the material which caused Mr. Elgaard to abandon running the order which he attempted to run immediately before the .375:1541 order, nor Mr. Elgaard's refusal to run the .375:1541 order. It is therefore entirely likely that there was not sufficient raw material in stock to run another order.

51. A more troubling concern is why Mr. Mullett did not simply have someone assist Mr. Elgaard in much the same way that Mr. Jewkes was able to direct another employee to help the day shift wire drawer as necessary and when required. Although Mr. Jewkes did not assign a "helper" to assist, he was able to accommodate the day shift wire drawer's concern that the work was physically demanding (although not unsafe) by instructing another employee to assist when necessary. Mr. Mullett did not provide Mr. Elgaard with a similar option. In our review of the evidence however we are satisfied that Mr. Mullett did not instruct or direct another employee to help Mr. Elgaard, not as a reprisal (and therefore in contravention of section 24) but simply because that option was not available to him at the time. Mr. Jewkes testified that, on the day shift it is relatively simple for an employee to ask another employee for assistance or for the foreman to direct another employee to help out when necessary. His evidence was that such a course of action "was pretty hard to do on the off shift, but on day shift we have labourers nearby." Similarly, the evidence of the respondent's witnesses and Mr. Pattison was to the effect that it was common amongst employees to ask another employee who was available for some temporary assistance. The practice of asking another employee to help out if the need arises was well established and known to the employees. Mr. Elgaard himself could have called someone over to his machine to help with the stringing and pointing. He did not do this. A reasonable inference to be drawn is that he did not do so because there was not a person available. Mr. Elgaard's evidence that he advised Mr. Mullett that he "was willing to run any machine in the plant", and was "willing to run #2 machine with *another* order. [He] just wouldn't run that machine with that order", is consistent with the inference we have drawn from the totality of the evidence that another employee was simply not available to help out with the running of the .375:1541 order.

52. Finally, we are of the view that whether or not the option of having another employee temporarily assist was viable or practicable on the night of May 2nd, must be assessed in light of the circumstances that had transpired. These include the fact that Mr. Elgaard had already performed the stringing and pointing procedure, (the unsafe act for which he required assistance) when he went to see Mr. Mullett, and the fact that Mr. Elgaard simply requested a "helper" without in any way explaining why or for what function of the operation the helper was needed. Mr. Elgaard's own evidence was that "stringing and pointing" and the safety of that procedure without a helper was not specifically discussed that night. Certainly, Mr. Elgaard did not simply ask for the temporary assistance of a co-worker. He specifically requested a "helper". Under these circumstances it is not unreasonable that Mr. Mullett, faced with request by Mr. Elgaard that he wanted a "helper" and not simply assistance, faced also with Mr. Elgaard's continued inability to explain why he needed a helper or why the running of that rod without a helper was not safe, and in the absence of having a helper available, checked to see if other orders could be run and when this was

not possible sent Mr. Elgaard home because of the lack of available work. Under the circumstances, Mr. Mullett could not have known or anticipated that had he simply suggested the assistance of another employee, presuming such other employee was even available, the problem might very well have been resolved.

53. In the result we find that Mr. Elgaard was sent home midway through the night shift because other work was not available. We are satisfied that he was not sent home *because* his employer or supervisor sought to discipline him, impose a penalty or intimidate or coerce him *because* he exercised his rights under the O.H.S.A. Accordingly, the complaint is dismissed.

DECISION OF BOARD MEMBER KAREN S. DAVIES;

1. The majority conclude that the complainant was not sent home because he exercised his rights under the O.H.S.A. They find rather, that the complainant was sent home because other work was not available to be done on that shift. Upon review of the evidence and the Act, I must disagree with that conclusion. I do agree that in sending Mr. Elgaard home, any relevant provisions of the collective agreement need to have been complied with.

2. The evidence revealed that it was common for employees to have the assistance of a fellow employee, a "helper" in stringing and pointing this heavier gauge wire. I do not draw the same distinction between asking a fellow employee and seeking to have a helper assigned. Surely it is appropriate for an employee to seek the permission and advice of the employer as to who is best available to provide help. The evidence shows that in the past help has been made available to complete the work in question, that the complainant asked for such help, was willing to continue the work if provided the help, and if help were made available, it would be unnecessary to send the complainant home. Not only that, the complainant's safety concern arising from his work refusal would also have been completely answered.

3. The only evidence in response to the above is that it is more difficult to provide such help on the night shift because fewer employees are working. There is no evidence in my view on which to conclude that merely because it may have been more difficult made it impracticable or meant that the only alternative was to send the complainant home.

4. I say this in the context of the purpose and protection provided by the Act. In my view, the effect of sending the complainant home was to penalize him. He lost wages for time he would have worked but for raising a safety concern. He was clearly willing to work provided that concern was addressed. To interpret subsection 23(10) as permitting a loss of wages in these circumstances not only imposes a penalty on a worker but may well further act to intimidate and deter the refusing worker and co-workers from raising future health and safety concerns. In my view, this case is consistent with *North American Plastics Company Limited*, [1987] OLRB Rep. Feb. 251 where, at para. 36, the Board said:

... such other directions might include sending an employee home. However, such a direction can only be given if the assignment of reasonable alternative work is *not practicable*. As already indicated, we're of the view that in all likelihood reasonable alternative work was available to which the complainant could have been assigned. We do not view the company's decision to send the complainant home as being motivated by a desire to penalize her for her refusal to work. Nevertheless, the failure to assign her alternative work in the circumstances of this case, amounted to a penalty to the complainant contrary to section 24 of the Act in that it resulted in a lowering of her take-home pay.

[Emphasis added]

5. I do not accept the majority's conclusion that Mr. Mullet could not have known or anticipated that had he simply suggested the assistance of another employee the problem would have been resolved. The employer maintained the position throughout that this was not a health and safety issue. The majority has found and I agree, that Mr. Elgaard did exercise his right to refuse based on a concern for safety. I agree that neither party was communicating as effectively as the Act contemplates. However, I am concerned that Mr. Mullet foreclosed any real opportunity to consider alternatives. Section 16 of the Act clearly places a duty on a *supervisor* to direct safe work practices and, at s.16(2)(c), to "take every precaution reasonable in the circumstances for the protection of the worker". The minutes of the meeting of May 4 say:

...

2. The procedure for running 1541 rod will be modified to include the phrase "a co-worker can be used for assistance during pointing and stringing."

...

In my view that constitutes agreement that provision of a helper or assistance is a "reasonable precaution". Ultimately, the employer has control of the workplace and in my view, must be very careful to give full and reasonable consideration to all options even in circumstances where at that moment they may not agree that a safety concern remains.

6. An interpretation of the Act permitting employers to impose a financial penalty will not encourage good labour relations between the employer and employees. Nor will it encourage employees to take an active role with employers to identify health and safety problems and maintain a safe and hazard-free workplace. I would have found that the employer has not met the onus of showing that it did not send Mr. Elgaard home in violation of section 24 of the O.H.S.A.

1395-88-R International Brotherhood of Electrical Workers, Local 1687, Applicant v. 510706 Ontario Limited, operating as Superior Contracting, Respondent

Bargaining Unit - Certification - Construction Industry - Parties agreeing to bargaining unit described as including all "registered" electricians - Designation order not using word "registered" - Board using language in designation order - No need to adjudicate dispute between parties as to whether certain persons are employees because union entitled to certification in any event - Certificates issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. Redshaw* and *D. A. MacDonald*.

DECISION OF THE BOARD; December 2, 1988, as amended January 6, 1989

1. The name of the respondent is amended to "510706 Ontario Limited, operating as Superior Contracting".

2. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on December 12,

1977, the designated employee bargaining agency is the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario.

3. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made under section 144(1) of the Act.

4. The Board authorized a Labour Relations Officer to inquire into and report to the Board with respect to the list and composition of the bargaining unit with respect to which this application was made. A Labour Relations Officer met with the parties for that purpose and has reported to the Board. The parties have been provided with a copy of the Officer's report and asked for their written submissions, if any, and whether they desired a hearing before the Board. The applicant has made written representations with respect to the manner in which it submits the Board should dispose of this application. It also took the position that no hearing is necessary. The respondent has made no written representations with respect to the Officer's report. Neither has it requested that the Board hold a hearing with respect to it. (We note that the respondent did request a hearing in its reply but failed to offer any reason for the Board to do so, either in accordance with section 97 of the Board's Rules of Procedure or otherwise. Nor did it reiterate that request at any subsequent time.) In the circumstances, the Board finds it appropriate to dispose of this application on the basis of the materials filed without an oral hearing.

5. According to the Officer's report, the parties have agreed that the bargaining unit herein should be described as:

- (i) all *registered* electricians and electricians' apprentices in the employ of the Respondent in the ICI sector of the construction industry in the Province of Ontario; and
- (ii) all *registered* electricians, and electricians' apprentices in the employ of the Respondent in all sectors of the construction industry in Board Area 19 and the Town of Englehart, save and except the ICI sector save and except non-working foremen and persons above the rank of non-working foreman.

[emphasis added]

6. The designation orders issued pursuant to section 139(1) of the Act describe the provincial units of employees contemplated by the province-wide collective bargaining scheme established by the Act for the industrial, commercial and institutional ("ICI") sector of the construction industry in terms of trades, and designate, for each such bargaining unit, an employer and an employee bargaining agency. In effect, such orders designate the trade(s) which "belongs" to each employee bargaining agency and its affiliated bargaining agents. As a result, the employee bargaining agencies, and their affiliated bargaining agents, can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (see *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction Ltd.*, [1983] OLRB Rep. Mar. 407 and July 1104; *Superior Plumbing and Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Wümer Heating and Plumbing Limited*, [1987] OLRB Rep. Oct. 1228). Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe an ICI sector bargaining unit in a manner which is inconsistent with the relevant designation order. To accommodate the designation system, and recognizing the trade union representation in the construction industry has historically been along trade or craft lines, the Board's practice in applications under section 144(1) is to describe bargaining units in terms of the relevant trade using the words of the relevant designation order.

7. The designation referred to in paragraph 2 above designates the International Brother-

hood of Electrical Workers and the IBEW Construction Council of Ontario “as the employee bargaining agency to represent in bargaining in the industrial, commercial and institutional sector of the construction all *Journeymen and Apprentice Electricians* and *Journeymen and Apprentice Linemen*” (emphasis added) represented by locals of the International Brotherhood of Electrical Workers as specified in the designation order. The designation order does not use the word “registered” anywhere and makes no reference to the *Apprenticeship and Tradesman’s Qualification Act*, R.S.O. 1980, c. 24, which the applicant submits the Board should apply in determining which persons were employees in the bargaining unit on the date this application was made.

8. The Board’s general practice is to describe bargaining units of electricians in terms of all electricians and electricians’ apprentices employed by the respondent employer. This is consistent with the aforesaid designation order and we see no reason to depart from that practice in this case. Accordingly, the Board finds, pursuant to section 144(1) of the Act, that all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians’ apprentices in the employ of the respondent in all other sectors of the construction industry within a radius of 81 kilometres (approximately 50 miles) of the Timmins Federal Building, and in the Town of Englehart, save and except non working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The parties agree that Mike Paquette, Guy Vien, Doug Cannon, Gerry Bergeron, Brian McCallum, Luc Desjardins, and Dave Krupka were employees in the bargaining unit on the date this application was made and are properly included on the list of employees. The respondent asserts that Mitch Delich and Joe Mawdsley should also be included. The applicant submits that they should not be included because neither of them was either a journeyman electrician or registered apprentice electrician at the time the application was made.

10. The trade of “electrician” is a compulsory certified trade under the *Apprenticeship and Tradesman’s Qualification Act*. We have already observed that, in the ICI sector of the construction industry, employee bargaining agencies and their respective affiliated bargaining agents can only represent in bargaining those employees in the trade which they have been designated to represent (see paragraph 6 above). There are also cases in which the Board has concluded that where an applicant for certification is a construction trade union designate to represent, in bargaining in the ICI sector, persons in a compulsory trade within the meaning of the *Apprenticeship and Tradesman’s Qualification Act*, it is appropriate to include in such bargaining units only employees who are either journeymen or registered apprentices in that trade (see *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594; *C. T. Windows Limited*, [1982] OLRB Rep. Nov. 1597 and 1983 OLRB Rep. May 627; *Mechanical Insulations Roofing and Siding Ltd.*, [1985] OLRB Rep. Apr. 549; *Naylor Group Incorporated*, [1986] OLRB Rep. Nov. 1559 and [1986] OLRB Rep. Nov. 1563).

11. However, whether or not it is appropriate for the Board to apply the *Apprenticeship and Tradesman’s Qualification Act* in determining which persons are employees in a bargaining unit relating to a compulsory certified trade for the purposes of an application for certification under the *Labour Relations Act* (and, concomitantly, whether or not the *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, *supra*, line of cases is correct), and whether or not the Board does apply it in this case, the Board can say with certainty that the applicant is entitled to be certified. In other words, regardless of the disposition of the dispute between the parties with respect to the inclusion of Messrs. Delich and Mawdsley on the list of employees, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the appli-

cation was made, were members of the applicant on September 21, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

12. For the reasons given in *Robin Hood Multi-Foods Inc.*, [1985] OLRB Rep. July 1159 (at paragraphs 6 to 11), with which we agree and adopt herein, there is no need to adjudicate the dispute between the parties, and thereby delay the issuance of certificates to the applicant, because the disposition thereof could not affect the result. Accordingly, we find it inappropriate and unnecessary to do so.

13. In the result, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

14. Further, and also pursuant to section 144(2) of the Act, a certificate will issue to the applicant in respect of all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry, except the industrial, commercial and institutional sector, within a radius of 81 kilometres (approximately 50 miles) of the Timmins Federal Building, and in the Town of Englehart, save and except non-working foremen and persons above the rank of non-working foreman.

1850-87-U; 2888-87-U Canadian Union of Public Employees, Local 1001, Complainant v. **University of Windsor**, Respondent v. Service Employees Union, Local 210, Intervener; Susan Dufour, Complainant v. Canadian Union of Public Employees, Local Union Number 1001, Respondent

Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Union breaking away from Ad Hoc Committee established to bargain the issue of pensions with the employer jointly with other bargaining agents - Employer breaching bargaining duty by pressing to impasse its position that the issue of pensions be bargained under the aegis of the Committee and by refusing to otherwise receive and negotiate the union's pension proposals - Posting not ordered but decision to be sent to all bargaining unit members - Damages denied because Board not convinced that unsuccessful strike would not have occurred but for the employer's position on negotiating pensions through the Committee

BEFORE: S. A. Tacon, Vice-Chair, and Board Members W. A. Correll and A. Hershkovitz.

APPEARANCES: Michael A. Church, Nick Kokic, T. Robinson and James Hart for the Canadian Union of Public Employees, Local 1001; George W. King, Dave Wylupek and Frank Eastham for the University of Windsor; Ken Brown and David Robert for the Service Employees Union, Local 210; Brian P. Nolan and Susan Dufour for the complainant in Board File 2888-87-U.

DECISION OF THE BOARD; November 29, 1988

1. Board File 1850-87-U is a complaint pursuant to section 89 of the *Labour Relations Act* in which the complainant trade union alleges that the respondent university violated sections 15, 64, 66, 67 and 70 of the Act. That complaint, as originally filed, named Frank Eastham as respondent as well. The complainant withdrew the complaint as against Frank Eastham and, accordingly, the Board amends the style of cause to reflect that change.

2. Board File No. 2888-87-U is a complaint wherein the complainant (Susan Dufour) asserts that the respondent trade union contravened its duty of fair representation imposed by section 68 of the Act. In an oral ruling which need not be reproduced herein, the Board refused to dismiss the complaint on the grounds sought by the respondent trade union in a preliminary motion, namely, that the complaint disclosed no *prima facie* violation of the Act and/or the complaint concerned internal union matters outside the jurisdiction of the Board.

3. The Board also heard submissions with respect to whether both complaints should be consolidated or heard together, sequentially or separately. For reasons given at the hearing but which, as well, need not be set out in this decision, the Board held that the complaints would not be formally consolidated for technical reasons relating to issue estoppel and *res judicata* given that the parties were not identical in each complaint but that the complaints would be heard together. It is useful to note at this point that several other matters which could have been raised as preliminary motions, on agreement, were to be argued at the conclusion of the proceedings. That is, the respondent trade union in the section 68 complaint asserted that the complaint should be dismissed on grounds of timeliness and/or estoppel and/or that the complainant had not exhausted the internal routes for redress. The respondent employer in Board File 1850-87-U contended that complaint should be dismissed for reasons of undue delay.

4. It is next appropriate to clarify the terminology utilized throughout. Board File 1850-87-U is referred to as the "section 89" complaint as distinct from Board File 2888-87-U, the "section 68" complaint. The complainant in Board File 1850-87-U and the respondent in Board File 2888-87-U is the Canadian Union of Public Employees, Local 1001, referred to as the "Union" or "CUPE Local 1001". The respondent in the section 89 complaint is the University of Windsor (the "university"). The complainant in the section 68 complaint is Susan Dufour (referred to as "Dufour"). The University also has collective bargaining relationships with the following bargaining agents: S.E.I.U. Local 210, the "intervener" in the section 89 complaint, i.e., the "secretary/clerical unit; CUPE Local 1393, the technicians; CUPE Local 100, the engineers; U.P.G.W.A. Local 1958, the campus police; U.W.F.A., the faculty.

5. Following discussions, the section 68 complaint was adjourned, on agreement, as follows:

Board File 2888-87-U

Labour Relations Act

Complaint under Section 89 of the Act

Between:

Susan Dufour

Complainant

- and -

Canadian Union of Public Employees, Local Union Number 1001

Respondent

The Complainant and the Respondent have agreed to the adjournment of the Section 68 complaint filed by Susan Dufour on the following terms:

1. The hearing of the s. 68 complaint to be adjourned pending the decision of the Board on the original s. 89 complaint filed by CUPE 1001 v. University of Windsor with this panel of the Board to remain seized;
2. If the union is successful in its s. 89 complaint (i.e., a declaration issues that the union may withdraw from the Ad Hoc Committee and bargain pensions separately) the complainant Dufour will withdraw her complaint, and it will not be refiled;
3. If the union is unsuccessful with respect to its s. 89 complaint, the complainant Dufour shall retain the right to request the Board to relist her s. 68 complaint for rehearing. Both parties agree that all their rights and positions, etc. are preserved in such event. Nothing in the agreed statement of facts between the University and the Union shall be binding upon the s. 68 complainant in the event that the Complainant seeks to relist the s. 68 complaint for hearing.
4. If the Board decides that the Union is able to negotiate separately outside of the Ad Hoc Committee, any agreement reached with the University of Windsor shall be subject to the ratification of the membership; furthermore, the Union Executive agrees that any decision to withdraw from the present pension plan will be put to the local membership for an informal vote first. Before such a vote shall be taken the membership shall have the pros and cons of withdrawal explained to them by an independent pension expert.
5. Without prejudice to the position of the parties, the Union Local Executive agrees to address the resolution of the procedural matters within the union local raised in this case.

Dated at Windsor, Ontario, this 27th day of June, 1988.

For the Complainant "Susan Dufour"
Susan Dufour

For the Respondent "Nick Kokic"
Nick Kokic

"Tom Robinson"
Tom Robinson

"James Hart"
James Hart

6. Subsequently, the union and the university reached an agreed statement of facts, reproduced herein:

Board File No.: 1858-87-U

BEFORE:

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES,

LOCAL UNION 1001

("Complainant")

- and -

UNIVERSITY OF WINDSOR

("Respondent")

AGREED STATEMENT OF FACTS

The parties agree that the following facts and exhibits referred to herein, and positions (as the case may be) shall be placed before the panel assigned to adjudicate the Complaint filed in this case for their consideration and reliance in determining the issues of law and fact in this proceeding.

1. The Complainant, Canadian Union of Public Employees, Local No. 1001, ("Union") is the certified bargaining agent for all employees of the University of Windsor ("University") save and except certain classes of employees excluded by the recognition clause contained in the collective agreement. (Reference may be made to Article 3.01 of the last collective agreement entered into between the parties -- which has been reproduced at Tab 1 of the Joint Exhibit Book filed by the parties with the Board in this matter). The Union is the successor bargaining agent to the predecessor bargaining agent certified by the Ontario Labour Relations Board in 1966.

2. The Union and University have been parties to a series of collective agreements over many years. The previous collective agreement was effective Nov. 21, 1985 to June 30, 1987. (Tab 1).

3. The Union has approximately 167 members in the employ of the University. This membership includes five (5) university departments; maintenance, custodial, housekeeping, food service, and grounds service. The majority of the membership is male and includes many employees with senior service to the University.

4. The University also has collective bargaining relationships with the following bargaining agents:

- | | | |
|-----|-----------------------|---|
| (a) | S.E.I.U. Local 210 | - (secretary/clerical)
approximately 298 members |
| (b) | C.U.P.E. Local 1393 | - (technicians)
approximately 67 members |
| (c) | C.U.P.E. Local 100 | - (engineers)
approximately 16 members |
| (d) | U.P.G.W.A. Local 1958 | - (campus police)
approximately 13 members |
| (e) | U.W.F.A. | - faculty
approximately 500 members |

5. The University has a pension plan known as The University of Windsor Employees' Retirement Plan ("E.R.P."). This plan has been reproduced and more particularly described in the materials contained at Tabs 2 and 4 inclusive of the Exhibit Book. Tab 2 is the E.R.P. as amended and restated at July 1, 1977. Tab 3 is the E.R.P. as at July 1, 1985, and the actuarial

report as at July 1, 1986 is set out at Tab 4. This plan is a contributory defined benefit pension plan.

6. The E.R.P. also covers approximately 192 non-union administrative personnel (management and excluded employees) below the rank of director.

7. The University of Windsor Faculty Association ("U.W.F.A") members, librarians and some directors are covered by the provisions of a separate pension plan known as the University of Windsor Faculty Association Pension Plan (U.W.F.A.P.P.) This plan is a money purchase plan with a minimum guarantee component. The members of the U.F.W.A. were covered by the E.R.P. until July, 1971, at which time the U.W.F.A.P.P. was established to cover the aforesaid groups. At that time, the E.R.P. was amended to exclude members of the Faculty, employees holding the rank of Department Director, Dean or Vice-President. At the time of the transfer from coverage under the E.R.P. to the U.W.F.A.P.P. the U.W.F.A. had approximately five hundred (500) members. The members of the unions and non-union administrative personnel remaining in the E.R.P. after July 1971 were not affected by the transfer of the individuals covered by the U.W.F.A.P.P. into the new plan referred to above. For the purposes of this hearing, the Board need not be concerned with the operation or the details concerning the U.W.F.A.P.P.

8. Prior to 1984, each of the five (5) bargaining agents whose members were covered by the terms of the E.R.P negotiated separately with the University in respect to any issues concerning amendments to the E.R.P. Each local had a designated pension representative.

9. Very few changes or amendments were effected to the E.R.P. in the years preceding 1984.

10. In 1984, the five (5) bargaining agents whose members were covered by the E.R.P. formed a committee to negotiate with the University in matters pertaining to E.R.P. The University was advised of such intentions by way of five (5) separate but identical letters dated April 9, 1984. These letters have been reproduced at Tab 5. The Committee became known as the Ad Hoc Joint Pension Committee ("Ad Hoc Committee").

11. The Union participated on the Committee through the designated pension representative and local union president representing the local's interest on the Committee.

12. The employee representatives on the Ad Hoc Committee were composed of two (2) representatives from each of the five (5) Unions and two (2) representatives from the non-union administrative personnel covered by the E.R.P. Although the Ad Hoc Committee bargained on pensions jointly in 1984 and 1985, execution and ratification of the negotiated amendments was done separately by each bargaining unit.

13. Commencing in 1984, the University recognized the Ad Hoc Committee and in fact bargained with this Committee on pension issues. A Memorandum of Agreement was executed between the University and each union representative on behalf of their respective local. This memorandum is set out at Tab 6. The terms of such memorandum required separate ratification by each local.

14. The University takes the position that by agreeing to negotiate with the Ad Hoc Committee it gave up its right to bargain issues with respect to pensions separately with each individual trade union. In consideration for surrendering its right to bargain individually with each local union, the University hoped to improve employer-employee relations and benefit its employees with more constructive and beneficial pension improvements.

15. The University did not advise the unions to the above effect and the Union is unaware of any written agreement wherein the University specifically surrendered any right to bargain any issue separately with the unions, including any issue relating to pensions.

16. In 1985, the University again bargained on pension issues with the Ad Hoc Committee. The Memorandum of Agreement in respect to pension issues entered into between the University and the local unions bargaining jointly through the Ad Hoc Committee is set out at Tab 7.

17. At approximately this time, the University and Union entered into the collective agreement referred to in Paragraph Two (2) of this Memorandum (effective Nov. 21, 1985 to June 30, 1987).

18. The Union through its designated pension representative from Nov. 1985 to Jan. 1987 (Mr. James Hart), and President, participated in the deliberations and workings of the Ad Hoc Committee.

19. In December, 1986, approximately 112 of 167 members of the Union signed a petition demanding the pension plan opened for changes in all areas including retirees. This petition was not presented to the University at any time.

20. The Union takes the position that after participating in the Ad Hoc committee for several years, it had become disenchanted with its experience on the Committee and felt the needs of the Union would be better served outside the Ad Hoc Committee. The Union designated pension representative noted that the Ad Hoc Committee was composed of representatives from non-union administrative personnel who did not have the option of resorting to a strike. In the Union's view, the groups represented by the Ad Hoc Committee had different interests and priorities regarding pension issues. Furthermore, the Union felt that certain other unions represented on the Committee did not honour agreements made within the Committee. The Union felt that certain other unions would not resort to a strike over any issue involving pensions. The Union was concerned because it has the largest group of retirees from amongst the members of the Ad Hoc Committee.

21. At a Union meeting on Jan. 18, 1987, the Union's designated pension representative, Mr. Jim Hart, presented a motion calling for the Union to break away from the Ad Hoc Committee and bargain on the issue of pension improvements separately with the University. This motion was passed by the membership.

22. On February 20, 1987, Mr. Nick Kokic ("Kokic"), President of the Union, wrote to Mr. Frank Eastham ("Eastham"), Director of Human Resources for the University, advising the University that the Union "no longer wished to negotiate [sic] our pension plan, with the joint pension committee." (Tab 8).

23. On February 25, 1987, Eastham wrote to Kokic advising that the University's position was that the bargaining committee for pensions was the Ad Hoc Committee. (Tab 9).

24. The Union, through its newly elected designated pension representative, Mr. Tom Robinson ("Robinson") orally advised the Chairman of the Ad Hoc Committee, Mr. Terry Edwards ("Edwards") as to the Union's decision referred to above in March, 1987. Edwards is an employee of the University of Windsor and is a member of C.U.P.E. Local 1393.

25. The Union served Notice to Bargain for the renewal of the collective agreement on the University on April 13, 1987.

26. The parties thereafter scheduled a series of negotiation meetings to commence on May 4, 1987. On this date, the parties met for the purposes of preliminary discussions and to exchange proposals. The Union's proposals included a reference to the pension plan stating that the Union would table its pension plan amendments at a later date.

27. The parties next scheduled negotiation meetings for June 4, 5, 24 and 26 and July 2 and 3, 1987, respectively. The June 4/87 meeting was subsequently cancelled and another day in June (June 26) was selected.

28. The parties met on June 5, 24, 25 and 26th as scheduled. By this time, the Union had available its pension proposals. The Union attempted to present such proposals to the University. The University refused to accept a copy of the aforesaid proposals for the reasons set out above. The negotiation meetings did not accomplish any significant agreements, as there were a large number of issues outstanding throughout negotiations.

29. On June 26, 1987, at the conclusion of the negotiating sessions, Mr. Bill Dingman, C.U.P.E.

staff representative, advised the University that the Union intended to request the appointment of a conciliation officer from the Minister of Labour. The Union had attempted unsuccessfully on this date to discuss the issue of pension plan amendments with the University's negotiating committee.

30. On June 29, 1987, Kokic wrote to Dr. Ron Ianni ("Ianni"), the President of the University of Windsor, complaining about the refusal of the University Negotiating Committee to accept the Union's pension proposals outside of the Ad Hoc Committee. The Union also alleged that the University was negotiating in bad faith. (Tab 10)

31. On June 30, 1987, the Union forwarded a Request to the Minister for the Appointment of Conciliation Officer.

32. By way of a letter dated June 30, 1987, (received by the Union on July 7, 1987) Ianni responded to Kokic's letter of June 29, 1987, urging the Union to participate in pension bargaining through the Ad Hoc Committee. (Tab 11)

33. The parties did not meet on July 2 or 3, 1987, on account of the Request for Appointment of Conciliation Officer referred to above.

34. On July 13, 1987, Kokic wrote to Ianni advising, in part, as to the Union's contemplation of proceeding with a complaint to the Ontario Labour Relations Board ("Board"). Kokic also on the same date wrote another letter to Eastham (enclosing a copy of the letter to Ianni of same date) requesting a full breakdown of the details of the current pension plan. (Tabs 12 and 13 respectively).

35. On July 14, 1987, the Minister appointed a Conciliation Officer who scheduled a conciliation meeting for Sept. 1, 1987.

36. On Aug. 17, 1987, Kokic wrote and delivered a letter to Edwards advising him that, "I thought we made our position clear regarding the pension. Our Local does no longer wish to negotiate [sic] pension with joint pension negotiating committee." The University subsequently obtained a copy of this letter. (Tab 14).

37. On August 30, 1987, the Union conducted a strike vote of its membership. The lack of progress on the Union's attempts to bargain on pension issues separately was explained to the membership. The strike vote was approved by a substantial majority of the membership who voted at this meeting.

38. On August 31, 1987, Kokic again wrote and delivered a letter to Edwards restating the Union's position. Furthermore, the Union objected to the portion of the proposal introducing the new clause known as 14.03(c). This letter was copied to Eastham. (Tab 15). The proposal has been reproduced at Tab 16.

39. On August 31, 1987, Kokic also wrote to Eastham enclosing a copy of the letter referred to above and restating the Union's position. (Tab 17).

40. On September 1, 1987, the parties met in conciliation with Conciliation Officer Marv Grossman ("Grossman"). At the outset of the meeting, the Union provided Grossman with a copy of the Union's proposals on the pension issue and asked him to present such to the University. The Union was advised by the University through Grossman that the University's position remained unchanged in respect to the issue of negotiating pension plan amendments separately with the Union, instead of through the Ad Hoc Committee. Accordingly, the University refused to accept the Union's pension proposals.

41. The parties attempted to utilize the day to negotiate other outstanding issues apart from the pension issue. The parties did not resolve many issues. The parties thereafter broke off negotiations awaiting the decision of the Minister on the question as to the appointment of a Board of Conciliation.

42. By way of a letter dated September 16, 1987, the Minister advised the parties that he had decided *not* to appoint a Board of Conciliation.

43. On September 17, 1987, Kokic again wrote to Eastham requesting the University to negotiate all issues including the pension proposals. (Tab 18). On September 18, 1987, Eastham responded to the Union by letter explaining that the University was (and always had been willing) to negotiate with the Union but maintained that the appropriate mechanism for the Union and all other unions for the bargaining of pensions was the Ad Hoc Committee. (Tab 19).

44. On September 19, 1987, Kokic responded to Eastham's letter of September 18, 1987, (referred to above) advising that the Union remained firm in its position and that the Union would not negotiate on its pension concerns with the Ad Hoc Committee which was scheduled to meet on September 22, 1987. (Tab 20).

45. Mr. Grossman was appointed a Mediator and thereafter scheduled a mediation meeting for September 29, 1987, in Windsor.

46. On September 25, 1987, the University prepared and forwarded a summary of its pension plan proposals (Pension Plan Information Update) to all members of the E.R.P. including retirees. (Tab 21).

47. On September 28, 1987, the parties through letters exchanged between Eastham and Kokic again reaffirmed the positions of their respective organizations and the effect such would have on their positions before the Mediator. (Tabs 22 and 23).

48. On September 29, 1987, the parties met in mediation. The University refused to accept or negotiate the Union's pension proposals outside of the Ad Hoc Committee. The Union refused to change its position and did not agree to return to the Ad Hoc Committee. The University presented (through the Mediator) to the Union a typed mediation offer of all outstanding issues except pension. (Tab 24). It did not address the issue of pension plan proposals as sought by the Union. The Union gave the Mediator a copy of its pension proposals but the University refused to accept such or discuss the issue separately with the Union.

49. On September 29, 1987, Eastham called a meeting with representatives from three of the four (4) unions which had remained in the Ad Hoc Committee. This meeting was held on September 30, 1987. At this time, Eastham distributed the University's Mediation Offer made to C.U.P.E. Local 1001. Each representative was informed as to the status of the collective agreement negotiations with C.U.P.E. Local 1001 and furthermore, each representative had received a copy of the University's Mediation Offer from Eastham. Later, on September 30, 1987, representatives of the Union attended a meeting convened by the Ad Hoc Committee. At this meeting, a representative(s) from each of the remaining four (4) unions in the Ad Hoc Committee was present.

50. By the time of the meeting referred to above, the Union had already advised the University and other unions as to the proposed strike date (October 2, 1987). The representatives of the other unions advised the Union that if C.U.P.E. Local 1001 did not return to the Ad Hoc Committee, the other unions would not support the proposed strike. C.U.P.E. Local 1001 refused to change its position.

51. On October 1, 1987, the University circulated a Fact Update (Tab 25), C.U.P.E. 1001 Negotiations Update (Tab 26) and Mediation Offer to all employees and retirees the University of Windsor. The University had also previously issued a similar Update (dated September 29, 1987) to the same group. (Tab 27).

52. It is the University's position that it disseminated this information because all other unions (including the Faculty Association, but excepting the Plant guards) have the right to refuse to cross a picket line. The University wanted its employees to be informed about the issues so they could decide whether or not to cross the line.

53. Throughout the course of negotiations, the Union maintained that it desired to meet and bargain with the University on pension issues separate from the Ad Hoc Committee. The Uni-

versity refused to receive or discuss the Union's proposals on this issue outside of the Ad Hoc Committee. The Union considered this as one of the two (2) most important issues. The University was advised of this by C.U.P.E. Staff representative, Ken McLelland who had taken over the conduct of negotiations after the strike commenced. the Union viewed the pension issue as integral to its bargaining proposals and posture.

55. On October 2, 1987, the Union commenced a legal strike against the University. At that time, there were approximately over twenty (20) issues of varying degrees of importance between the parties, including the union's request that it no longer bargain pensions with the University within the Ad Hoc Committee.

56. On October 4, 1987, the Union filed this Complaint with the Board. The University was served directly with a copy of this complaint.

57. The Union was the only union that commenced a legal strike against the University. The other unions eventually settled all issues (except pension issues which still remained to be negotiated between the University and the Ad Hoc Committee) without a work stoppage and signed Memoranda of Agreement with the University by on or around October 15, 1987, which were implemented shortly thereafter.

58. The Union did not feel that the strike was an effective strike and by the second (2nd) week of the strike, some members had expressed an indication that they would return to work unless the strike was settled immediately. In fact, members of the other trade unions had crossed the picket lines established by the Union by this time.

58.(a) On October 14 and 15, 1987, the parties continued to negotiate all outstanding issues except the pension issue. The Union was prepared to await the outcome of the decision of the Board on the issue of as to whether or not the Union could negotiate separately with the University on the pension issue.

59. By the early morning of October 16, 1987, the parties had settled all outstanding issues save and except pension issues and executed a Memorandum of Agreement. (Tab 28).

60. The Memorandum of Agreement was ratified on October 18, 1987. The membership returned to work immediately, commencing later on October 18, 1987. The strike had lasted two (2) weeks.

61. The University presented a pension proposal to the Ad Hoc Committee. (Tab 29) On November 13, the University presented further proposals to the Ad Hoc Committee and the parties thereafter entered into a Memorandum of Agreement to amend the E.R.P. (Tab 30). The Memorandum stipulated that implementation of the amendments to the plan were conditional upon the ratification of the Memorandum by all Ad Hoc Committee members, including C.U.P.E. 1001.

62. The University implemented the terms of the collective agreements (including wage rate increases and retroactive monies) to all other unions save and except C.U.P.E. Local 1001. The University takes the position that the reason the provisions of the collective agreement with C.U.P.E. Local 1001 were not implemented was because the Memorandum of Settlement specifically indicated that this would not occur until the issue of the proper forum to negotiate pension was resolved.

63. On June 14, 1988, all members of the E.R.P. (including counsel for C.U.P.E. Local 1001) were advised that the Ad Hoc Committee (now known as the Joint Pension Negotiating Committee) had, in agreement with the University of Windsor, decided to ratify and implement all aspects resulting from the 1987 negotiations on Pensions. (Tab 31 and 32). It is the position of the University that the purpose of attempting ratification of the Pension Amendments was to accommodate a large number of employees who are awaiting implementation of the pension amendments before they retire. Many of these employees have already worked beyond their scheduled retirement dates.

64. The memorandum of explanation provided to members of the E.R.P. referred to above is

reproduced at Tab 33. The Union has not participated in or consented to the amendments to the E.R.P. referred to above.

65. The University conducted a vote held on June 27, 1988, for the purposes of ratifying the Memorandum of Agreement (E.R.P.) reached between the University and Ad Hoc Committee referred to above. The Memorandum was ratified by majority.

66. Without admitting the propriety or validity of such by the University, the Union is prepared to accept that the University took and maintains its position on the issues in dispute for the following reasons:

- (i) The University believed that the Ad Hoc Committee had been permanently established to bargain pension issues;
- (ii) The E.R.P. had been amended and restated as at July 1, 1985 to include Article 14.03(b) and that such meant that the bargaining committees for pensions were the Ad Hoc Committee and Board of Governors Committee on Pensions;
- (iii) Article 22.04 of the collective agreement between the Union and the University refers to E.R.P.;
- (iv) The University was not advised of the dissolution of the Ad Hoc Committee and took the position that, accordingly, the Committee had not been dissolved;
- (v) If it acceded to the request of the Union to bargain pensions separately, the University would have been violating the terms and conditions of the E.R.P., its agreement with the Ad Hoc Committee to bargaining pensions jointly, and the provisions of Section 15 of the *Labour Relations Act* (with respect to the other four (4) unions represented on the Committee).

DATED at Windsor, this 29th day of June, 1988.

FOR THE COMPLAINANT FOR THE RESPONDENT

"Nick Kokic - President"

"Frank Eastham"

Nick Kokic

Frank Eastham

"James Hart"

James Hart - Steward

"Tom Robinson"

Tom Robinson - Pension Representative

7. Counsel for Susan Dufour indicated his concurrence in the agreed statement of facts except as reserved in a letter dated July 4, 1988:

I have reviewed the Agreed Statement of Facts and Exhibit Book prepared by Mr. George King and Mr. Michael Church.

Subject to the terms of your order and reserving my rights as indicated therein, I confirm my client's acceptance of the facts set out therein, with the caveat that my client is not aware of nor has she seen the petition referred to in paragraph 19 of the Agreed Statement of Facts. Therefore, I specifically reserve my client's rights with respect to this item.

8. The parties called no *viva voce* testimony and proceeded directly to argument on the basis on the agreed statement of facts. Those thorough and able arguments are next set in a highly abbreviated form.

9. Counsel for the complainant reviewed the agreed statement of facts and documentation in some detail in support of his assertion that the respondent had violated the various sections

pleaded. It was submitted that the union, as exclusive bargaining agent, was entitled to negotiate the issue of pensions separately, regardless of the wisdom of that position, and that the union's right had not been restricted by the collective agreement, or otherwise. Specifically, the history and terms of reference of the Ad Hoc Committee demonstrated that body was a procedural mechanism for dealing with the pension issue rather than a substantial ceding of authority from the local unions. Indeed, each party retained the right, it was argued, to determine whether to continue joint bargaining in each round of negotiations. In this instance, counsel contended that the complainant had given ample notice of its indication to bargain pensions separately. Counsel argued that the respondent violated its statutory obligation to bargain in good faith by not negotiating with the complainant on pensions, by pressing to impasse the respondent's position that pensions were to be negotiated by the Ad Hoc Committee, by disclosing the respondent's bargaining position at mediation to the other unions which were part of the Ad Hoc Committee, by refusing to even physically accept the complainant's proposals regarding the pension plan and by negotiating pensions with the Ad Hoc Committee at all given the complainant's stance and especially by accepting Article 14.03(c) of The University of Windsor Employees' Retirement Plan (E.R.P.). In effect, the complainant had lost the opportunity to persuade the respondent of its point of view because of the respondent's conduct, a stance antithetical to the duty to bargain in good faith. Moreover, complainant's counsel asserted the respondent's communication to the University community, including the complainant's bargaining unit members, contravened sections 15, 64, 66 and 70 by referring to "your" committee (when the complainant had left the Ad Hoc Committee) in the university Pension Plan Information Update circular and inaccuracies in the university Fact Update Sheet. It was also contended that, even if the respondent's position on bargaining pensions was correct, the respondent had contravened the Act by failing to discuss (as distinct from agreeing to) the complainant's position on pensions. The respondent's implementation of the collective agreements negotiated with the other locals which were members of the Ad Hoc Committee was characterized as petty and vindictive and demonstrating an intention to punish and discriminate against the complainant for having taken the position it did on pensions, in contravention of the Act. In support of his submissions, counsel referred to and reviewed: *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309; *Burns Meats Ltd.*, [1984] OLRB Rep. Aug. 1049; *Royal Conservatory of Music*, [1985] OLRB Rep. Nov. 1652; *Rexwood Products Limited*, [1987] OLRB Rep. Feb. 267; *United Brotherhood of Carpenters & Joiners of America*, [1978] OLRB Rep. Aug. 776; *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138; *Toronto Star Newspapers Limited*, [1979] OLRB Rep. Aug. 811; *A. N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393; *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *The Globe & Mail (Advertising Department)* (unreported, February 3, 1987) (Joyce).

10. With respect to relief, counsel argued that far more than a declaration and posting was required to restore the complainant's position to what it would have been apart from the respondent's illegal conduct. Specifically, counsel argued the strike would probably not have been necessary and, thus, the lost wages of those in the bargaining unit and expenses of the complainant incurred because of the strike should be awarded as damages. Further, the respondent should be directed to implement the other provisions of the collective agreement, as agreed to, including retroactivity and wage increases, while the parties negotiate the remaining issue of pensions. The complainant also sought the costs of negotiating and concluding the pension issue and compensation for the loss of opportunity to be the "leader" amongst the locals (excluding faculty) on the pension issue. A declaration that Article 14.03(c) and (d) in the E.R.P. not extend to the complainant was sought. Finally, while indicating its satisfaction with the information received to date from the respondent, counsel requested that the Board remained seized with this aspect during negotiations.

11. Counsel for Susan Dufour stated that, while he took issue with many of the arguments

of complainant's counsel, his submissions would be directed to the section 68 complaint rather than the complaint between the complainant CUPE Local 1001 and the respondent university. Accordingly, he made no submissions at this point.

12. Counsel for the respondent first addressed the issue of delay. Counsel submitted that the complainant knew of the respondent's position that pensions should be negotiated through the Ad Hoc Committee in February and, by the date of the first negotiating session, at the latest, should have filed a complaint with the Board. Having tried to use its leverage through a threat of a complaint and a strike, the complainant, having lost the strike, was not entitled to then come to the Board. At the very least, since a timely complaint would have led to an early resolution of the issue so negotiations could have preceded without a strike, it was argued the complainant was entitled to no more than a declaration, assuming the respondent's conduct violated the Act. With respect to the merits, counsel reviewed the agreed statement of facts and documentary material and contended that, while the complainant was indisputably the exclusive bargaining agent, the complainant had surrendered its right to bargain pension issues separately and could no longer unilaterally withdraw from the Ad Hoc Committee. It was argued that the respondent had not refused to receive the complainant's pension proposals outright; rather, the respondent asserted those proposals could only be tabled and discussed at the Ad Hoc Committee because, to bargain that issue outside the Committee, would have constituted a breach of section 15 by the respondent vis-a-vis the other members of the committee. In short, respondent's counsel submitted the respondent had made "reasonable efforts" to conclude a collective agreement and conducted itself throughout without animus against the complainant. Counsel then argued that, even if the complainant was correct in its position that it could unilaterally withdraw from the Ad Hoc Committee, the complainant was estopped from doing so in respect of the 1987 round of negotiations. In effect, it was asserted that the respondent had relied to its detriment on the complainant's conduct in jointly proposing and participating in the Ad Hoc Committee, that the complainant was estopped from withdrawing from the committee at least for the 1987 round of negotiations. Finally, counsel reviewed the respondent's communications with the university and the other members of the Ad Hoc Committee. He argued that the communications were not misleading nor had the respondent negotiated with the Ad Hoc Committee regarding the complainant's pension. Rather, the other members were merely informed of the respondent's position. The respondent had sought the support of those other unions and the community or at least to deny that support to the complainant if a strike ensued. Cases referred to in support included: *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. Nov. 748; *Royal Conservatory of Music*, *supra*; *Fraser v. Board of Trustees of Central United Church et. al.* (1982), 38 O.R. (2d) 97 (Ont. H.C.); *Burns Meats Ltd.*, *supra*; *John Burrows Ltd. v. Subsurface Surveys Ltd and G. Murdoch Whitcomb*, [1968] S.C.R. 607; *Canadian General Electric Co. Ltd.*, (1971) 22 L.A.C. 149 (Johnston); *Township of Innisfil Police Association* (1985), 19 L.A.C. (3d) 263 (Hinnegan); *Southam Murray Printing (Council of Printing Industries of Canada)* (1986), 24 L.A.C. (3d) 76 (Swan); *Fruehauf Trailer Company of Canada Limited*, [1975] OLRB Rep. Jan. 77; *American Can Canada Inc.*, [1983] OLRB Rep. Oct. 1609; *The Citizen*, [1979] OLRB Rep. Mar. 177.

13. Counsel for the respondent submitted that there had been no violation of sections 15, 64, 66 and 70. In the alternative, if there was a violation, the breach was "technical" only and just a declaration was warranted. With respect to the other remedies sought, counsel argued there was no basis on which to conclude the strike would not have occurred but for the pension issue, given the matters outstanding at the time. Further, the terms of the back to work agreement expressly provided that implementation would await resolution of the pension issue.

14. In reply, counsel for the complainant asserted the considerations reflected in the jurisprudence on delay were not present here or, at most, might affect the remedy. Likewise, with

respect to the issue of estoppel, counsel stated that the jurisprudence was not applicable to the instant circumstances, that the complainant had acted reasonably in giving notice of its intention to bargain pensions unilaterally and that the respondent had not, at the time, asserted the notice was inadequate. As to the surrender of the complainant's rights as exclusive bargaining agent to bargain the pension issue other than through the Ad Hoc Committee, counsel submitted that an exclusive bargaining agent might be precluded from giving up such a fundamental right on a permanent basis or, at a minimum, such a surrender of authority would have to be in express terms, unlike in the instant case.

15. The Board intends to deal first with the issue of delay, followed by estoppel, the merits of the allegations and, finally, the appropriate remedy.

16. The essence of the respondent's position with respect to delay is that the complainant knew in February of the university's assertion that pensions could only be negotiated through the Ad Hoc Committee and, by the first negotiating session in May at the latest, should have filed a complaint with the Board. In the Board's view, it was not necessary for the complainant to proceed with its complaint before the Board until the point at which the parties reached an impasse in their bargaining. Prior to that point, the complainant was entitled to reiterate its position that pensions would no longer be bargained jointly and to use whatever legitimate leverage was available to seek to persuade the university to accept its stance. The Board recognizes that parties frequently adopt positions early in bargaining which seem immutable but which, as the deadline for the legal exercise of economic sanctions nears, are modified. The Board is reluctant to *force* a party to file a complaint with the Board early in negotiations, before the parties have fully explored their positions and opportunities for compromise have arisen. This would be the likely result of the Board exercising its discretion to refuse to hear a complaint subsequently filed when the parties are at impasse and economic sanctions are imminent. This is not to say that a party is precluded from proceeding with a complaint at an earlier stage, particularly where the issue is clearly joined and constitutes an impediment to negotiations. It is simply that the Board would be hesitant to refuse to hear a complaint alleging bad faith bargaining filed later in the bargaining process when a strike or lockout is imminent. Thus, the Board does not uphold this submission of the respondent. However, the Board would add that a complainant must engage in a delicate assessment of the most appropriate time at which to file its complaint given the potential impact on remedy. In this regard, the Board would echo the sentiments expressed in *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. Nov. 748 at paragraph 12:

... Parties must recognize, however, that the Board cannot turn back the clock. If negotiations have broken down as a result of a breach of [then] section 14, then the party seeking remedial relief must bring the matter quickly to the attention of the Board, or run the risk of the Board's remedial order being less efficacious. The Board should not be viewed as a court of last resort to be used when all other approaches fail.

The Board returns to this point, *infra*, in dealing with the appropriate relief.

17. The Board intends to deal relatively briefly with the issue of estoppel. The respondent asserted that, even if the complainant had the unilateral right to withdraw from the Ad Hoc Committee, the complainant was estopped from doing so, at least for the 1987 round of negotiations, because the respondent had relied to its detriment on the complainant's conduct in jointly proposing and participating in the Ad Hoc Committee for two rounds of bargaining. The Board does not consider it necessary to extensively review the doctrine of estoppel. That has been done in several of the cases cited by both counsel, including *The Globe & Mail (Advertising Department)*, *supra* and the cases cited therein; *Southam Murray Printing*, *supra*; *Board of Commissioners of Police for the Township of Innisfil*, *supra*; *Canadian General Electric Co. Ltd.*, *supra*; *John Burrows Ltd. v.*

Subsurface Surveys Ltd. and G. Murdoch Whitcomb, supra. The Board is not persuaded the requisite elements of estoppel, including the need for detrimental reliance, have been made out. In item 14 of the Agreed Statement of Facts (paragraph 6 above), the university indicated that, in giving up its right to bargain pensions separately with each bargaining agent, the university hoped to improve employer - employee relations and benefit its employees with more constructive and beneficial pension improvements. Those aims are undoubtedly laudable. In the Board's opinion, though, they do not constitute evidence of the sort of detrimental reliance referred to in the doctrine of estoppel. In the alternative, even if this could be considered "detrimental reliance", the Board finds that any "estoppel" was brought to an end by timely notice in respect of the 1987 round of negotiations. The Board does not dispute that a representation may operate prospectively and may extend beyond the term of a collective agreement depending on the nature of the representation and the detrimental reliance. In the instant case, the essence of the "representation" concerns the *format* of bargaining for each round of negotiations. Under the circumstances, the Board is satisfied that any "estoppel" as to the format of bargaining could be brought to an end for an upcoming round of bargaining, provided the university was informed at the latest by the time notice to bargain was given that the bargaining agent no longer wished to utilize the Ad Hoc Committee. In this instance, the university was informed in writing in February 1987, by the union president, that the union no longer wished to negotiate pensions through the Ad Hoc Committee, well in advance of notice to bargain in April 1987. The Board sees no merit in the respondent's argument that the estoppel could only cease to operate for the round of negotiations following the 1987 bargaining. Thus, the estoppel argument of the respondent fails.

18. In considering the merits of the complainant's allegations, the Board first deals with the asserted breaches by the respondent of its duty to bargain in good faith. There was no dispute that section 15 requires the employer to recognize and deal only with the employees' exclusive bargaining agent and that the employer must intend to enter into a collective agreement. The respondent contends that the complainant trade union relinquished its right to bargain the issue of pensions unilaterally by forming and participating with the four other bargaining agents in the Ad Hoc Committee in respect of the 1984 and 1985-86 rounds of negotiations. The Board here need not conclusively determine whether an exclusive bargaining agent could ever irrevocably cede to another body its authority to bargain a critical issue such as pensions. In the instant case, the Board has reviewed carefully the collective agreement in force prior to the 1987 round of bargaining and the documents covering the Employees' Retirement Plan (E.R.P.). In the Board's view, express language would be needed to sustain a conclusion that the complainant had ceded such authority. Such language is simply not present. The collective agreement, in Article 22.04 merely stipulates that the employer is required to maintain the present E.R.P at specified benefit levels and deals with the timing of normal retirement. The E.R.P itself (at the start of the 1987 negotiations) referred to a Retirement Committee which dealt with the administration of the plan and could recommend changes to both the Board of Governors' Committee on pensions and the Ad Hoc Joint Review Negotiating Committee (referred to herein as the Ad Hoc Committee). The Ad Hoc Committee was created following receipt of identical letters dated April 9, 1984 to the university from each of five bargaining agents. The letters specified that the joint committee would negotiate only in respect of pensions. Ratification of the negotiated amendments to the pension plan was done separately by each bargaining unit. Taken together, the documentary material does not support a conclusion that the complainant had irrevocably ceded its authority to negotiate pensions except through the Ad Hoc Committee. In reaching this conclusion, the Board regards the analysis in *Burns Meats Ltd., supra* as helpful insofar as that case permitted the employer therein to require a return to negotiations in the context of the legally-defined limits of the exclusive bargaining agent, notwithstanding a voluntary national bargaining format which had existed for approximately thirty years. Therefore, the Board finds that the complainant was entitled to unilaterally withdraw from

the Ad Hoc Committee (having given adequate notice of its intention, as noted earlier) and bargain pensions separately in respect of the 1987 negotiations.

19. It is not disputed that the respondent repeatedly sought to have the complainant return to the Ad Hoc Committee, refused to receive the complainant's pension proposals at bargaining meetings and refused to bargain that issue except through the Ad Hoc Committee. While the university was entitled to seek to persuade the complainant to rejoin the Ad Hoc Committee, that demand could not be pressed to impasse given that the complainant was entitled to bargain that issue separately from the Ad Hoc Committee: *Toronto Star Newspapers Limited*, *supra*; *United Brotherhood of Carpenters & Joiners of America*, *supra*. In so doing, the respondent contravened its duty to bargain in good faith. Further, the respondent also violated that duty in refusing to receive and negotiate the complainant's pension proposals. The Board has elaborated on the scope of the duty to bargain in *Royal Conservatory of Music*, *supra*, in the following excerpt which is usefully noted here:

31. Given that "voluntarism" is the touchstone, it is implicit that the Board's role pursuant to section 15 of the Act is one of monitoring the *process* of bargaining and not the *content* of the proposals tabled. This role stands in sharp contrast with the American approach embodied in the "mandatory-directory" classification of proposals and the different consequences for bargaining of classification as a "mandatory" or "directory" item. The mandatory-directory approach has been rejected in this jurisdiction as not consonant with the legislative scheme: see *Consolidated Bathurst*, *supra*; *Pulp and Paper Industries*, *supra*; *Westinghouse Canada Limited*, *supra*.

32. This does not mean that the Board is totally distanced from the *content* of the parties' proposals or that there are no limits whatsoever on the scope of bargaining. The Board may have regard to the *content* of items tabled in order to determine whether either party does not intend to enter into a collective agreement (e.g., is engaging in surface bargaining) or whether the employer, for example, is seeking to undermine the union as exclusive bargaining agent by tabling an offer "tailor-made for rejection": see *Radio Shack*, [1979] OLRB Rep. Dec. 1120; *Fotomat Canda Ltd.*, *supra*; *Irwin Toy Ltd.*, [1983] OLRB Rep. July 1064. Further, the Board may review the content of proposals to assess whether any items are "illegal". For example, a strike for recognition or to resolve a jurisdictional dispute is contrary to the legislative scheme: see *United Brotherhood of Carpenters & Joiners of America*, *supra*; *Toronto Star Newspapers Ltd.*, [1979] OLRB Rep. May 451, [1979] OLRB Rep. Aug. 811. See also; *Croven Limited*, [1977] OLRB Rep. Mar. 162; *A.N. Shaw Restorations Ltd.*, [1976] OLRB Rep. Sept. 504; *T. Barlsen & Sons*, [1960] OLRB Rep. May 80; *Canada Cement LaFarge Ltd.*, [1980] OLRB Rep. Nov. 1583; *Treco Machine Tool Ltd.*, [1982] OLRB Rep. Dec. 1954. The Board notes that, although two examples of demands which have been found to be "illegal" are mentioned and other examples are contained in the cases referred to, the appropriate scope of the concept of "illegality" is not before the Board in this case.

33. However, subject to the comments outlined in paragraph 32 above, the Board will not evaluate or censure the content of proposals tabled by the parties. Again, apart from those comments, if the parties are free to *agree* that any matter may become part of their collective agreement, it is implicit that each party must be free to *table* the matter for discussion. While this is perhaps the bluntest enunciation of this principle, the proposition is not novel: see *Westinghouse*, *supra*; *Sunnycrest Nursing Homes*, *supra*; *Consolidated Bathurst*, *supra*; *Canadian Industries Limited*, *supra*. In the instant case, then, the respondent may not refuse to discuss the "9 point programme". The respondent characterized the 9 point programme as intruding on areas reserved to management. Quite simply, the parties are bargaining about what is reserved to management; the 9 points are not subjects a priori "off-limits" for discussion. The definition of a collective agreement in section 1(1)(e) of the Act is expansive; apart from illegal matters, the Board should not seek to restrict the scope of clauses which may be incorporated by agreement of the parties in *their* collective agreement. For the Board to accept the respondent's arguments would inevitably draw the Board into the mandatory-directory analysis of the duty to bargain. This, the Board will not do. Nor does the Board accept the respondent's asserted distinction between the union acting on behalf of the employees in the bargaining unit and acting

on behalf of the Conservatory as an "institution" as relevant to the duty imposed by section 15 of the Act. The union is the exclusive bargaining agent for employees in the bargaining unit - no more and no less. But as exclusive bargaining agent, the union is entitled to present its proposals for a collective agreement. The union may be seeking to occupy the "high ground" in an attempt to broaden its support or to introduce novel clauses in a collective agreement or be acting from other motives. Provided the motive is not the avoidance of a collective agreement, the Board will not question the wisdom of the priorities established or proposals formulated by the parties.

34. The Board, then, finds that the respondent's refusal to discuss the 9 point programme constitutes a violation of the duty to bargain in good faith. It is important, though, to clarify the obligation imposed on the respondent by virtue of section 15 of the Act. The statutory scheme establishes a structure for bargaining, a framework to facilitate full and frank discussion against a backdrop of the right to resort to economic sanctions. Thus, the respondent must *discuss* the proposals tabled by the union, including the 9 point programme. This does not mean the university must *agree* to those proposals in the current form or at all. The university, however, must respond to those proposals by stating its position with its explanation of that position. It may well be that rational communication between the parties will enable an accommodation to be reached without recourse to economic sanctions. Or, resolution of the matters in dispute may require exercise of such sanctions. That is for the parties to determine. The Board's role, apart from the *caveats* already noted in paragraph 32, is to monitor the process of bargaining to ensure that both parties intend to conclude a collective agreement and are making every reasonable effort to do so.

In the instant case, the university was required, by the section 15 duty, to receive the complainant's proposals on pensions and discuss those demands. The respondent was not required to accede the substance of the proposals themselves, a theme which will be dealt with further under relief.

20. The complainant also submitted that the university contravened the *Labour Relations Act*, including section 15, when the university disclosed its (the university's) bargaining position to the other members of the Ad Hoc Committee and by continuing to negotiate pensions through the committee, (especially Article 14.03(c) and (d) in the E.R.P). The Board disagrees. With respect to the disclosure, the respondent and complainant met at mediation on September 29, 1987 where both parties maintained their respective positions regarding negotiation of pensions. The university presented, through the mediator, a typed mediation offer of all outstanding issues except pensions. By the next day when the university disclosed that offer to the other members of the Ad Hoc Committee at a meeting, the complainant had already advised the university and the other unions of a strike date of October 2. The respondent's conduct in disclosing the mediation offer was certainly intended to weaken the support by the other unions for the complainant with respect to the imminent strike. That is not a violation of the Act: both parties in negotiations are free to seek to enlist support for their respective positions. The respondent cannot, and did not, seek to negotiate the complainant's *collective agreement* with the other locals nor to *bargain directly* with the employees in the bargaining unit. There is no evidence that the respondent did other than disclose an offer already made to the complainant. In so doing, the respondent did not violate the Act (referring to the various sections pleaded in addition to section 15 as set out in paragraph 1 above). Moreover, the university did not act improperly in continuing to negotiate pensions with the remaining members of the Ad Hoc Committee. It is clear from the documentary material, taken together, that the articles to which the complainant takes exception were not intended to be applied to the complainant unless and until ratified by the complainant. The Board would emphasize that the university was engaged in collective bargaining negotiations with the other four locals and, therefore, bound by the section 15 duty in respect of those sets of negotiations. Pensions were a legitimate part of that bargaining. The complainant cannot insist, as a matter of law, nor should the complainant have reasonably expected, that those other negotiations cease while the complainant pursued its agenda to be the "leader" in bargaining pensions. Thus, the Board finds no violations in respect of

the conduct of the respondent in disclosing its mediation offer or continuing to negotiate pensions to the Ad Hoc Committee with the remaining locals.

21. It is appropriate at this juncture to deal with the complainant's contention that the respondent's implementation of the collective agreements negotiated with the other locals violated the Act because it was allegedly intended to punish the complainant for seeking to bargain pensions separately. The Board first notes that the four other bargaining agents concluded collective agreements without a strike; all but the provisions regarding pensions apparently were implemented at that time. That is not surprising given the circumstances. It is apparent that the pension amendments negotiated at the Ad Hoc Committee were resolved as of November 13, 1987 but that document was not signed by the complainant and, accordingly, was held in abeyance by the remaining members of the committee. When the dispute between the complainant and the respondent had not been resolved by May 1988, the other locals signed a letter of understanding with the university in order to implement, in respect of those other locals, the pension amendments agreed to the previous November. That document expressly noted that implementation was voluntary on the university's part and without prejudice to its position that the November Minutes of Settlement must be executed by all members of the Ad Hoc Committee before one settlement was binding and enforceable. The implementation of the other collective agreements and pension amendments may well have been galling to the complainant. However, the complainant had settled its strike on October 16, 1987 by signing a memorandum of agreement which *expressly* provided that "It is clearly understood that final ratification and implementation of this agreement will not occur until the resolution of the pension issue". In the face of the documentation, particularly the terms of the memorandum of agreement signed by the complainant (and there is no indication that that agreement was other than voluntary), there is simply no evidence before the Board from which it may reasonably be concluded that the university acted as it did in order to punish the complainant. Therefore, the complainant's assertions in this regard fail.

22. The Board next turns to the question of the communication by the respondent with the university community, including members of the bargaining unit represented by the complainant. The Board affirms the principles expressed in the jurisprudence regarding consideration of communications between an employer and bargaining unit employees in light of the obligations imposed by sections 64, 67 and 15. The jurisprudence confirms an employer's right to communicate but requires circumspection in the exercise of that right lest freedom of expression becomes a guise for undermining the credibility of the bargaining agent: *A. N. Shaw Restoration Ltd.*, *supra*. The timing of the communication is often critical: contact early in negotiations and/or early in a collective bargaining relationship is more likely to be characterized as improper: *A. N. Shaw Restoration*, *supra*; *American Can Canada Inc.*, *supra*; *The Citizen*, *supra*. Communication in the form of direct bargaining with the employees is prohibited: *Globe Spring and Cushion Co. Ltd.*, *supra*. In contrast, communications which merely involve explaining the employer's position, especially where there has been a past practice of such communication, have not been found improper: *The Citizen*, *supra*; *American Can Canada Inc.*, *supra*. These and other cases to the same effect have been reviewed in a recent decision in *Toronto Star Newspapers Limited*, [1988] OLRB Rep. Sept. 987. Noted therein, and in early decisions such as *Fruehauf Trailer Company of Canada Ltd.*, *supra*, is the following caution: (from *Fruehauf Trailer*):

14. As a general matter the Board must be very careful not to insert itself, without hesitation, into the bargaining process as a censor of the communications between the parties engaged in this often emotionally charged exercise. A more intrusive approach would provoke disruptive litigation over what is essentially unavoidable human nature. Furthermore we believe that reasonable employees and diligent trade unions have little difficulty evaluating and responding to most of the isolated direct communications that may occur during collective bargaining.

23. In this context, then, the Board examines the impugned communications in the instant case. The respondent and the complainant have an established, mature bargaining relationship. The communications in question occurred late in the bargaining process when the parties were at or post mediation. The Pension Plan Update, issued September 25, 1987, merely constitutes a summary of the plan improvements tabled by the university at the Ad Hoc Committee but does not disparage the complainant (or the other unions) nor does it seek to negotiate directly with the employees in the various bargaining units. The Board does not regard the use of the term "your" with reference to the Ad Hoc Committee as a "misleading inaccuracy", as asserted by the complainant. The complainant's position with respect to bargaining pensions was hardly secret and no reasonable member of the bargaining unit represented by the complainant would have concluded from the reference to "your" that the complainant was bargaining pensions through the Ad Hoc Committee. The Fact Update of October 1, 1987 simply recited a statement by the complainant's president quoted in the local newspaper and provided additional information to place the quote in context. Finally, the Negotiations Updates (with the complainant) released September 29 and October 1 by the university explained the items in dispute and accurately noted the positions of the parties at those points but did so without suggesting that the university intended to negotiate with anyone other than the complainant as exclusive bargaining agent. Thus, the Board find that the impugned communications were within the ambit of permissible communications between an employer and the employees in the bargaining unit, in accordance with section 64 of the Act and did not contravene sections 64, 67 or 15. At all times (except as noted in paragraphs 18 and 19 above), the university was prepared to conclude a collective agreement only with the complainant as exclusive bargaining agent of the employees in the bargaining unit. Nor did the disclosures to the other union members of the Ad Hoc Committee constitute improper communication. The Board need not repeat its comments in paragraph 20 above but would note the timing of those disclosures (after mediation with a strike imminent) and their purpose (to enlist the support of the other locals or, at least, to deny that support to the complainant in the upcoming strike). The university was not bargaining directly with the employees in the bargaining unit represented by the complainant nor seeking to undermine the support of those employees for their bargaining agent.

24. The Board has found that the respondent violated the duty to bargain in good faith in pushing to impasse its position that the issue of pensions be bargained under the auspices of the Ad Hoc Committee and in refusing to otherwise receive and negotiate the complainant's pension proposals (see paragraph 19 above). The Board must then determine the relief appropriate to those contraventions. Certainly, the complainant is entitled to a declaration that those aspects of the respondent's conduct contravened the Act and to a Board direction that the respondent cease and desist from insisting pensions be negotiated through the Ad Hoc Committee. The respondent is further directed to meet with the complainant forthwith and negotiate pensions in a manner consonant with the duty to bargain in good faith. The respondent acknowledged that Articles 14.03(c) and (d) of the E.R.P. negotiated in the absence of the complainant would not be binding on the complainant and, hence, the Board need not issue a separate declaration to this effect, as requested by the complainant. As is stated in the agreed Statement of Facts (item 66), the university maintained its position on bargaining pensions because of its belief that the Ad Hoc Committee had been permanently established to negotiate pension issues, that the Ad Hoc Committee had not been dissolved and, therefore, if the university acceded to the complainant's request to bargain pensions separately, the university would have been violating the terms and conditions of the E.R.P., the agreement with the Ad Hoc Committee and the duty imposed by section 15 of the Act in respect of the other four unions represented on the Committee. The Board has, for the reasons given, found that the university did violate its section 15 duty vis-a-vis the complainant, with regard to the conduct noted earlier in this paragraph. In these unusual circumstances, the Board is not persuaded that it would be appropriate to direct a posting. However, the Board does regard it as appropriate that the respondent forthwith forward a copy of this award to each person in the bar-

gaining unit represented by the complainant and, in addition, to the representatives on the Ad Hoc Committee of the other locals.

25. The complainant has sought additional relief, namely, the lost wages of those in the bargaining unit and expenses of the complainant incurred because of the strike, a Board direction that the respondent implement the other provisions of the collective agreement including retroactivity and wage increases, while the parties negotiate the issue of pensions, costs of negotiating the pension issue and compensation for the loss of opportunity to be the “leader” amongst the locals (excepting faculty) on the pension issue. In considering that requested relief, the Board begins with the principle that the remedies should endeavour to restore the complainant’s position to that which would have occurred but for the respondent’s misconduct. But, as stated in paragraph 16 above in quoting an excerpt from *The Journal Publishing Company of Ottawa Limited, supra*, the Board cannot “turn back the clock” to provide an efficacious remedy where the loss arose or was exacerbated by the *complainant’s* delay in bringing the allegations before the Board.

26. The costs of negotiating the pension issue are expenses which the complainant would normally bear in any round of bargaining where both parties negotiated in good faith. To the extent those costs may be increased somewhat or may be separately identifiable, is the result, in the Board’s view, of the complainant’s delay in filing the complaint rather than being properly attributable to the respondent’s misconduct. While the Board declined to refuse to hear the complaint on the grounds of delay, if the complainant had acted promptly, the matter would likely have been resolved so that bargaining could have proceeded in the usual course on all issues. Moreover, the Board’s remedial authority should not be utilized to compensate for damage which properly results from the legal use of economic sanctions nor to redress an unfavourable bargaining situation or disparity in economic power. At the time the *complainant* called the strike in October 1987, there were outstanding over twenty issues of varying degrees of importance, of which the pension question was only one of the two most critical to the complainant. In such a situation, the Board is not convinced that the strike would not have occurred *but for* the respondent’s position on negotiating pensions through the Ad Hoc Committee. The complainant was *entitled* to resort to timely economic sanctions in an effort to *impose* its terms on the many issues outstanding at the commencement of the strike. Having done so, the complainant is *not entitled* to recover, as *damages*, the lost wages of the bargaining unit members or its expenses associated with the strike in the circumstances of this case.

27. Nor is the Board prepared to direct that the respondent implement the other provisions of the collective agreement, including retroactivity and wage increases, while the parties negotiate the issue of pensions. Firstly, as the complainant’s counsel conceded, if the parties resume bargaining on pensions and reach an impasse, either may properly resort to economic sanctions to break the deadlock (assuming, of course, that no unfair labour practices are committed in those further negotiations). For the Board to impose some “provisions” of a collective agreement not yet finally concluded would be an unwarranted intrusion into the collective bargaining process. Moreover, such a direction would fly in the face of the back to work protocol *voluntarily* signed by the complainant and which expressly stipulates that “final ratification and implementation of this [collective] agreement will not occur until the resolution of the Pension Issue”. The Board will not permit a complainant to circumvent the terms of an agreement freely signed under the guise of a “make-whole” order. While “loss of opportunity” has been acknowledged as an appropriate head of damages in some circumstances in response to bad faith bargaining, the Board does not regard the loss of opportunity to be the “leader” amongst the locals (excluding faculty) as warranting such an award in the circumstances of this case. The Board has held that the complainant was entitled to negotiate the issue of pensions separately from the Ad Hoc Committee. As indicated in the *Royal Conservatory* case, *supra*, the Board will not question the wisdom of a party’s proposals. Obvi-

ously, the question of pensions is of considerable importance to the complainant, particularly its leadership. However, in its decision to withdraw from the Ad Hoc Committee because of its view that the other locals would not strike over pensions, the complainant may well have so isolated itself from those other locals and the collective bargaining leverage inherent in joint bargaining on pensions that the complainant's goal of "leadership" regarding pensions is, for practical purposes, unattainable. To refer again to the *Royal Conservatory* case, *supra*, the Board directed the respondent therein to discuss the 9 point programme and *to respond* to the proposals by stating its position with its explanation of that position, but acknowledged that this did not mean that the respondent was required to *agree* to those proposals.

28. Thus, the Board rejects the various additional remedies sought as inappropriate for the reasons noted. Finally, the complainant requested that the Board remain seized with respect to its request for information disclosure from the respondent although acknowledging that the material provided to date was satisfactory. This approach does not commend itself to the Board. Should there be further information requested by the complainant but refused by the respondent, the complainant may file a new complaint before the Board (although it would clearly be in the interest of both parties to present the factual background covered in the instant complaint, if considered relevant, in an expeditious manner, perhaps by agreement of the parties).

29. For the foregoing reasons, the Board hereby declares that the respondent violated the duty imposed by section 15 of the Act by pressing to impasse its position that the issue of pensions be bargained under the aegis of the Ad Hoc Committee and by refusing to otherwise receive and negotiate the complainant's pension proposals. The respondent is hereby directed to cease and desist from insisting pensions be negotiated through the Ad Hoc Committee. The respondent is further directed to meet with the complainant forthwith and negotiate pensions in a manner consonant with the duty to bargain in good faith. Finally, the respondent is directed to forward forthwith a copy of this award to each person in the bargaining unit represented by the complainant and, in addition, to the representatives on the Ad Hoc Committee of the other locals. The other allegations and requested relief are dismissed.

30. The Board remains seized to deal with any matters arising out of the implementation of this decision.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0424-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 704039 Ontario Limited, c.o.b. as Construction 2000, (Respondent) v. Group of Employees (Objectors)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0600-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Applicant) v. Manutec Steel Industries Ltd. (Respondent)

Unit: "all employees of the respondent in Brampton, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (115 employees in unit)

0717-88-R: United Brotherhood of Carpenters & Joiners of America, (Applicant) v. Modular Cabinet Systems Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0938-88-R: Labourers' International Union of North America, Local 247 (Applicant) v. Muttart Builders' Supplies Ltd. (Respondent)

Unit #1: "all employees of the respondent in Brockville, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (20 employees in unit)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (3 employees in unit)

1150-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pierre Gagne Contracting Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, employees engaged as surveyors, construction labourers and truck drivers in the employ of the respondent in the District of Thunder

Bay, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1176-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Form Rite Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in London, save and except foremen, persons above the rank of foreman, lab technician, quality control clerks, office and sales staff, process engineers and students employed during the school vacation period" (471 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1279-88-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. D & M Laurin Industries Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Alexandria, save and except foremen, persons above the rank of foreman, and office and sales staff" (11 employees in unit)

1367-88-R: United Food & Commercial Workers, Local 175 (Applicant) v. Canada Safeway Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its retail stores in the City of Thunder Bay, save and except assistant store manager, persons above the rank of assistant store manager, graduate and undergraduate pharmacists, confidential secretary to the District Manager and employees in the bargaining units for which any trade union holds bargaining rights as of August 31, 1988" (14 employees in unit)

1376-88-R: Ontario Nurses' Association (Applicant) v. Reliacare Inc. c.o.b. as Port Dover Health Care Center (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Port Dover, Ontario, save and except administrator, persons above the rank of administrator, and persons regularly employed for not more than twenty-four hours per week" (2 employees in unit)

1388-88-R: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. Whyte & Braniff Glass Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1441-88-R: Ontario Nurses' Association (Applicant) v. Canadian Red Cross Society (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the Canadian Red Cross Society at the Ottawa Blood Service Centre, save and except assistant nursing manager, persons above the rank of assistant nursing manager and persons regularly employed for not more than twenty-four hours per week" (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the Canadian Red Cross Society at the Ottawa Blood Service Centre regularly employed for not more than twenty-four hours per week save and except assistant nursing manager and persons above the rank of assistant nursing manager" (5 employees in unit) (*Having regard to the agreement of the parties*)

1522-88-R: Labourers' International Union of North America, Local 607 (Applicant) v. George Stone & Sons Division of 612354 Ontario Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, in all sectors

of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

1523-88-R: Labourers’ International Union of North America, Local 527 (Applicant) v. Curb Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman” (34 employees in unit)

1538-88-R: IWA-Canada (Applicant) v. G. Henderson Distributors Manitoba Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Thunder Bay save and except foremen, persons above the rank of foreman, office, clerical and sales staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

1571-88-R: Service Employees’ International Union, Local 210 Affiliated with Service Employees’ International Union AFL:CIO:CLC (Applicant) v. Bruce County Public Library Board (Respondent)

Unit: “all employees of the respondent at its Headquarters Building in the Town of Port Elgin, save and except supervisors, persons above the rank of supervisor, financial secretary and persons regularly employed for not more than twenty-four (24) hours per week” (6 employees in unit) (*Having regard to the agreement of the parties*)

1590-88-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Dunmark Electric (Ancaster) Ltd. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1591-88-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Dunmark Electric (Ancaster) Limited (Respondent)

Unit: “all electricians, electricians’ apprentices and labourers in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

1593-88-R: Christian Labour Association of Canada (Applicant) v. Arbor Living Centers Inc. c.o.b. as Regency Park Lodge (Respondent)

Unit: “all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (17 employees in unit) (*Having regard to the agreement of the parties*)

1596-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. CAMI Automotive Inc. (Respondent)

Unit: “all employees of the respondent at Ingersoll, save and except area leaders, persons above the rank of area leader, office, clerical, technical and sales staff and plant guards” (90 employees in unit) (*Having regard to the agreement of the parties*)

1599-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Rexleigh Gardens Ltd. (Respondent)

Unit: “all employees of the respondent engaged in cleaning at 187, 189, 190, 191, 193, 194 and 195, Rexleigh

Drive, Toronto, Ontario, including resident superintendents, save and except Property Manager, persons above the rank of Property Manager, office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

1604-88-R: Service Employees' International Union, Local 204, Affiliated with the S.E.I.U. AFL:CIO:CLC (Applicant) v. Woodhall Park Estates Ltd. (Respondent)

Unit #1: "all employees of the respondent in Brampton, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

1614-88-R: Christian Labour Association of Canada (Applicant) v. West Lincoln Multilevel Health Facility Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent at Grimsby, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week" (9 employees in unit)

Unit #2: "all employees of the respondent at Grimsby regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff" (25 employees in unit)

1616-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Dak Paving Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1622-88-R: International Union United Plant Guard Workers of America, Local 1962 (Applicant) v. General Motors of Canada Ltd. (Respondent)

Unit: "all security guards employed by the respondent in St. Catharines, save and except sergeants, persons above the rank of sergeant, office and clerical staff, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of October 3, 1988" (37 employees in unit) (*Having regard to the agreement of the parties*)

1645-88-R: Union of Bank Employees, Local 2104 - CLC (Applicant) v. Howard Smith (Cornwall) Credit Union Ltd. (Respondent)

Unit: "all employees of the respondent in Cornwall, Long Sault and Alexandria, save and except managers, persons above the rank of manager, and Secretary to the General Manager" (11 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1646-88-R: Ontario Public Service Employees Union (Applicant) v. West Nipissing General Hospital (Respondent)

Unit: "all paramedical employees employed in the West Nipissing General Hospital at Sturgeon Falls, Ontario for not more than 24 hours per week and students employed during the summer vacation period, save

and except professional medical staff; Charge Laboratory Technologist, Charge Radiology Technologist; Director of Food Services; Director of Medical Records; Director of Physiotherapy; Director of Pharmacy; and persons above that rank; and persons covered by subsisting collective agreements as of October 6, 1988" (3 employees in unit) (*Having regard to the agreement of the parties*)

1648-88-R: Teamsters Local No. 230, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lafarge Canada Inc. (Respondent)

Unit: "all employees of the respondent at its Permanent Concrete Division, Ready Mix Plant, working in and out of the City of Cornwall, save and except foremen, persons above the rank of foreman, office and sales staff" (14 employees in unit) (*Having regard to the agreement of the parties*)

1672-88-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Ltd. (Respondent)

Unit #1: "all waitresses, waiters, buspersons, kitchen staff, cashiers, and bartenders employed by the respondent at its Swiss Chalet Restaurant location at 570 Bloor Street West, Toronto, save and except Assistant Dining Room managers, persons above the rank of Assistant Dining Room Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all waitresses, waiters, buspersons, kitchen staff, cashiers, and bartenders regularly employed for not more than 24 hours per week and students employed during the school vacation period employed by the respondent at its Swiss Chalet Restaurant located at 570 Bloor Street West, Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager" (25 employees in unit) (*Having regard to the agreement of the parties*)

1674-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation 469 (Respondent)

Unit: "all employees of the respondent engaged in cleaning and maintenance at 90 Ling Road, Scarborough, Ontario, including Resident Superintendent, save and except Property Manager and persons above the rank of Property Manager" (4 employees in unit) (*Having regard to the agreement of the parties*)

1703-88-R: Ontario Nurses Association (Applicant) v. Reliacare Inc. c.o.b. Port Dover Health Care Centre (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of Port Dover regularly employed for not more than 24 hours per week, save and except administrator and persons above the rank of administrator" (3 employees in unit) (*Having regard to the agreement of the parties*)

1706-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rimfire Construction Corp. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the employ of the respondent in all other sectors in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1710-88-R: Service Employees' International Union, Local 204, affiliated with the S.E.I.U., AFL:CIO:CLC (Applicant) v. Anglican Houses (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto at its Street Outreach Services Program, save and except the Program Director, persons above the rank of Program Director, and the Secretary to the Program Director" (9 employees in unit) (*Having regard to the agreement of the parties*)

1711-88-R: Ontario Nurses' Association (Applicant) v. University of Guelph (Respondent)

Unit #1: "all registered and graduate nurses of the respondent employed in a nursing capacity at its Medical Services Department at Guelph, save and except Clinic Administrator, persons above the rank of Clinic Administrator, persons regularly employed for not more than 24 hours per week and employees in bargaining units for which any trade union held bargaining rights as of October 17, 1988" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses of the respondent regularly employed in a nursing capacity for not more than 24 hours per week at its Medical Services Department at Guelph, save and except the Clinic Administrator, persons above the rank of Clinic Administrator and employees in bargaining units for which any trade union held bargaining rights as of October 17, 1988" (3 employees in unit) (*Having regard to the agreement of the parties*)

1712-88-R: United Steelworkers of America (Applicant) v. Knappe & Vogt Canada Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (56 employees in unit) (*Having regard to the agreement of the parties*)

1714-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Diamond Stonebridge Contracting (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1720-88-R: United Steelworkers of America (Applicant) v. Falconbridge Ltd. (Respondent)

Unit: "all office and clerical employees of the respondent at its Indusmin Division in the Town of Midland, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of October 18, 1988" (3 employees in unit) (*Having regard to the agreement of the parties*)

1740-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Tri-Mana Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1784-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. MTD Products Limited (Respondent)

Unit: "all employees of the respondent at its Distribution Centre in Kitchener, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and technical staff and those employees for whom any trade union held bargaining rights as of October 25, 1988" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1788-88-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Multi Insulation Systems Ltd. (Respondent)

Unit: "all journeymen and apprentice insulators and asbestos workers in the employ of the respondent in the

industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice insulators and asbestos workers in the employ of the respondent in all other sectors in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville and the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

1791-88-R: Canadian Union of Public Employees (Applicant) v. Ottawa-Carleton Life Skills Inc. (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, secretary to the Executive Director, Executive Assistant to the Executive Director, Accountant, Secretary-Typist to the Accountant and Data Entry Clerk-Accounting” (80 employees in unit) (*Having regard to the agreement of the parties*)

1792-88-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. City Interior Company (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit) (*Clarity Note*)

1804-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. R.M. Belanger Ltd. (Respondent)

Unit: “all construction labourers and all employees of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

1815-88-R: United Steelworkers of America (Applicant) v. Waterloo Spring Company Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of Waterloo, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (154 employees in unit) (*Having regard to the agreement of the parties*)

1816-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local Union 46 (Applicant) v. Sprint Mechanical Inc. (Respondent)

Unit: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

1829-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Applicant) v. Lomar Mechanical Corporation Ltd. (Respondent)

Unit: "all boilermakers and boilermakers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all boilermakers and boilermakers' apprentices in the employ of the respondent in all other sectors in the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1859-88-R: Peterborough Typographical Union Local 248 (Applicant) v. Wilson & Wilson Ltd. (Respondent)

Unit: "all employees of the respondent at its newspaper operations in Lindsay, save and except managers, those persons above the rank of manager, those persons regularly employed for not more than 24 hours per week and employees in bargaining units for which any trade union held bargaining rights as of November 2, 1988" (39 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1875-88-R: Service Employees' International Union, Local 210 Affiliated with Service Employees International Union AFL:CIO:CLC (Applicant) v. Dedi-Care Centres Ltd. (Respondent)

Unit #1: "all employees of the respondent at Maplewood Manor Retirement Home in the Town of Seaforth, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses and those employees regularly employed for not more than 24 hours per week" (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent at Maplewood Manor Retirement Home in the Town of Seaforth regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, professional medical staff and registered and graduate nurses" (14 employees in unit) (*Having regard to the agreement of the parties*)

1877-88-R: International Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Tomes Lemonides Bulldozing & Grading & Sons Inc. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1914-88-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Helm Interiors (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit) (*Clarity Note*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0624-88-R: Ontario Public School Teachers' Federation (Applicant) v. The Waterloo County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the Regional Municipality of Waterloo, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (192 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	192
Number of persons who cast ballots	88
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	88

Number of ballots marked in favour of applicant	80
Number of ballots marked against applicant	8

1612-88-R: United Steelworkers of America (Applicant) v. Trutec Industries (Canada) Inc. (Respondent) v. Sheet Metal Workers International Association, Local 540 (Intervener)

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff" (33 employees in unit)

Number of names of persons on list as originally prepared by employer	48
Number of persons who cast ballots	39
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	39
Number of ballots marked in favour of applicant	32
Number of ballots marked in favour of intervener	7

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1371-88-R: University of Guelph Police Association (Applicant) v. University of Guelph (Respondent)

Unit: "all Special Constables employed by the University of Guelph at Guelph, save and except officers at the rank of Sergeant and above" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1

1603-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Eureka Coach Company Limited (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 2679 (Intervener)

Unit: "all employees of the respondent in Concord, Ontario, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (118 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	130
Number of persons who cast ballots	111
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	111
Number of ballots marked in favour of applicant	102
Number of ballots marked in favour of intervener	9

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3115-83-R: Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Projecta Engineering & Construction Inc. (Respondent) Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607 (Intervener #1) v. Ontario Provincial Conference of the United Brotherhood of Carpenters and Joiners of America (Intervener #2)

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work and all other employees in the employ of the respondent in the District of Thunder Bay, the District of Rainy River and the District of Kenora, including the Patricia portion, save and except non-working foremen, persons above the rank of non-working foreman and employees covered by subsisting collective agreements to which the respondent is a party" (3 employees in unit) (Vote not counted)

3116-83-R: Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters &

Joiners of America (Applicant) v. Cencan Engineering & Construction Inc. (Respondent) Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607 (Intervener #1) v. Ontario Provincial Conference of the United Brotherhood of Carpenters and Joiners of America (Intervener #2)

Unit: "all construction labourers and all employees engaged in cement finishing, terrazzo tile laying, waterproofing and restoration work and all other employees in the employ of the respondent in the District of Thunder Bay, the District of Rainy River and the District of Kenora, including the Patricia portion, save and except non-working foremen, persons above the rank of non-working foreman and employees covered by subsisting collective agreements to which the respondent is a party" (15 employees in unit) (Vote not counted)

0126-84-R: Lumber & Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. R. Corazzo Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607 (Intervener)

Unit: "all construction labourers and all employees engaged in cement finishing, terrazzo tilelaying, waterproofing and restoration work and all other employees in the employ of the respondent in the District of Thunder Bay, the District of Rainy River and the District of Kenora, including the Patricia portion, save and except non-working foremen, persons above the rank of non-working foreman and employees covered by subsisting collective agreements to which the respondent is a party" (3 employees in unit) (Vote not counted)

0252-86-R: Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Sillman Company (Construction) Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 607 (Intervener)

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing or restoration work in the institutional, commercial and industrial sectors of the construction industry in the Province of Ontario and all construction labourers and all employees engaged in cement finishing waterproofing or restoration work in all other sectors of the construction industry in the District of Kenora, Rainy River and Thunder Bay (including Patricia portion)" (6 employees in unit) (Vote not counted)

0269-88-R: Service Employees' International Union, Local 210, Affiliated with Service Employees' International Union AFL:CIO:CLC (Applicant) v. Glemby International Canada Ltd. (Respondent)

Unit #1: (*see Applications for Certification Withdrawn*)

Unit #2: "all employees of the respondent in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit)

Number of names of persons on list as originally prepared by employer	111
Number of persons who cast ballots	107
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	107
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	85

1273-88-R: United Steelworkers of America (Applicant) v. Usarco Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Hamilton, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, and students employed during the school vacation period" (250 employees in unit)

Number of names of persons on revised voters' list	251
Number of persons who cast ballots	237
Number of spoiled ballots	1

Number of ballots marked in favour of applicant	109
Number of ballots marked against applicant	127

1274-88-R: United Steelworkers of America (Applicant) v. Powco Steel Products Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Barrie, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (45 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	45
Number of persons who cast ballots	41
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	41
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	32

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1477-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Canadian Industrial Specialties Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	3

0492-88-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. 715470 Ontario Limited c.o.b. as CFM Industries and Carlo's Electric Limited (Respondent) v. Carlo's Electric Employees Association (C.E.E.A.) (Intervener) v. Group of Employees (Objectors)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	10
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	10
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	7

1125-88-R: United Steelworkers of America (Applicant) v. Unified Engineering & Contracting Inc. (Respondent)

Unit: "all employees of the respondent in Hamilton, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	14

Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	10
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	6
Ballots segregated and not counted	4

1292-88-R: United Food & Commercial Workers International Union Local 175 AFL:CIO:CLC (Applicant) v. Interface Inc. o/a Interface Flooring Systems Canada (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Belleville, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (29 employees in unit)

Number of names of persons on list as originally prepared by employer	29
Number of persons who cast ballots	29
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	28
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	14
Ballots segregated and not counted	1

1647-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Acmetrack Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (100 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	6
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	3

Applications for Certification Withdrawn

3338-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Povia Carpentry Trim o/b 563808 Ontario Inc. & Labourers' International Union of North America, Local 183; F.J. Carpentry (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener)

3493-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Looby Construction Limited (Respondent)

0269-88-R: Service Employees' International Union, Local 210, Affiliated with Service Employees' International Union, AFL:CIO:CLC (Applicant) v. Glemby International Canada Ltd. (Respondent)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

0357-88-R: International Union of Elevator Constructors Local 90 (Applicant) v. Riverside Elevators Incorporated (Respondent)

1253-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Frattaroli Plumbing & Heating Ltd. (Respondent)

1449-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Appli-

cant) v. Crete Flooring Ltd. (Respondent) v. Operative Plasterers & Cement Masons International Association of the United States and Canada, Local 598 (Intervener)

1450-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 593 (Applicant) v. J.M.R. Electric Ltd. (Respondent)

1493-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Silverwood Enterprises Ltd. & Silverwood Structural Inc. (Respondent)

1600-88-R: Ontario Public Service Employees Union (Applicant) v. The Grey Bruce Regional Health Centre (Respondent)

1799-88-R: Association of Professional Student Services Personnel (Applicant) v. Toronto Board of Education (Respondent) v. Canadian Union of Public Employees (Intervener)

1803-88-R: Ironworkers District Council of Ontario (Applicant) v. Kenoyd Limited, trading as Pickering Welding & Steel Supply (Respondent) v. United Steelworkers of America (Intervener)

1820-88-R: Representative Association of Ontario (Applicant) v. Retail, Wholesale & General Workers' Union (Respondent)

1837-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Stacey Brothers, A Division of Ault Foods Ltd. (Respondent)

1860-88-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lafarge Canada Inc., Permanent Concrete Division (Respondent)

1910-88-R: Labourers' International Union of North America, Local 527 (Applicant) v. Beaver Road Builders Ltd. (Respondent)

1947-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. National Refractories (Respondent)

1963-88-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Jentec Drywall (Respondent)

1996-88-R: International Ladies Garment Workers Union, AFL:CIO:CLC, Ontario District Council (Applicant) v. Preston Manufacturing (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1686-88-FC: International Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Traders Metal Company Ltd. (Respondent) (*Withdrawn*)

1879-88-FC: Energy and Chemical Union (Applicant) v. Chinook Chemicals Company (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2585-86-R: United Food & Commercial Workers Union Local 175 (Formerly Local 409) (Applicant) v. The Parking Authority of the Corporation of the City of Thunder Bay, Phillips Security Agency Inc., and Panther Security and Investigation Ltd. (Respondents) v. The Corporation of the City of Thunder Bay (Intervener #1) v. Canadian Union of Public Employees Local 87 (Intervener #2) (*Withdrawn*)

0746-87-R: Teamsters Local No. 938 and Teamsters Union Local 141 (Applicants) v. Hutton Transport Ltd.,

St. Marys Cement Corporation, Canada Building Materials Company and Pre-Con Company (Respondents) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. Cement, Lime, Gypsum & Allied Workers Division of International Brotherhood of Boilermakers (Intervener #2) v. Energy and Chemical Workers Union, Local 424 (Intervener #3) v. Labourers' International Union of North America, Local 597 (Intervener #4) v. Group of Employees (Objectors) (*Dismissed*)

0319-88-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Walmarc Electric Ltd. & Walter Mikloska & Marcel Pruski (Respondents) (*Granted*)

0586-88-R: International Brotherhood of Painters & Allied Trades (Applicant) v. Dant Industries Ltd. Dunwoody Ltd., Warratt Holdings Inc., & One-Vinyl Window Mfrs. Ltd. (Respondents) (*Granted*)

0604-88-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Duncan's Repair Service; & B.U. Duncan Enterprises Incorporated (Respondent) (*Withdrawn*)

0801-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. EM Carpenters (1982) Ltd. & Hi-Skill Construction Ltd. (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Granted*)

1351-88-R: International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicant) v. Level Masonry Company & Novel Masonry Ltd. (Respondents) (*Granted*)

1546-88-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. P & G Roofing & Sheet Metal Work Inc., & Ray Cyr Roofing & Sheet Metal Work (1964) Co. Ltd. (Respondents) (*Withdrawn*)

1548-88-R: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. Fincan Construction Company Ltd., Tuomi Brothers Company Ltd., 562110 Ontario Inc., c.o.b. as Tuomi General Contractors & 705981 Ontario Ltd., c.o.b. as TCL (Respondents) (*Granted*)

1666-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Goodfellow & Dougherty Ltd. and Peterborough Heating & Service (Respondents) (*Granted*)

SALE OF A BUSINESS

2586-86-R: United Food & Commercial Workers International Union Local 175 (Formerly Local 409) (Applicant) v. The Parking Authority of the Corporation of the City of Thunder Bay, Phillips Security Agency Inc., & Panther Security & Investigation Ltd. (Respondents) v. The Corporation of the City of Thunder Bay (Intervener #1) v. Canadian Union of Public Employees, Local 87 (Intervener #2) (*Withdrawn*)

0745-87-R: Teamsters Local No. 938 and Teamsters Local No. 141 (Applicants) v. Hutton Transport Ltd., St. Marys Cement Corporation, Cement Building Materials Company & Pre-Con Company (Respondents) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. Cement, Lime Gypsum & Allied Workers Division of International Brotherhood of Boilermakers (Intervener #2) v. Energy and Chemical Workers Union Local 424 (Intervener #3) v. Group of Employees (Objectors) (*Dismissed*)

3044-87-R: Retail, Wholesale & Department Store Union, Local 414 (Applicant) v. New Dominion Stores Inc. & The Great Atlantic & Pacific Company of Canada Ltd. (Respondents) v. United Food & Commercial Workers International Union, Locals 175 & 633 (Intervener) (*Withdrawn*)

0319-88-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Walmarc Electric Limited & Walter Mikloska & Marcel Pruski (Respondents) (*Granted*)

0586-88-R: International Brotherhood of Painters & Allied Trades (Applicant) v. Dant Industries Ltd., Dunwoody Ltd., Warratt Holdings Inc., & One-Vinyl Window Mfrs. Ltd. (Respondents) (*Granted*)

0605-88-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Duncan's Repair Service; & B.U. Duncan Enterprises Incorporated (Respondent) (*Withdrawn*)

0749-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Widcor Ltd. & Green-King Ltd. (Respondents) (*Granted*)

0800-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) V. EM Carpenters (1982) Ltd. & Hi-Skill Construction Ltd. (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Granted*)

0904-88-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Markus & Son Ltd. & 688966 Inc. (Respondents) (*Granted*)

1351-88-R: International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicant) v. Level Masonry Company & Novel Masonry Ltd. (Respondents) (*Granted*)

1545-88-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. P & G Roofing & Sheet Metal Work Inc. & Cyr Roofing & Sheet Metal Work (1964) Co. Ltd. (Respondents) (*Withdrawn*)

1548-88-R: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. Fincan Construction Company Ltd., Tuomi Brothers Company Ltd., 562110 Ontario Inc., c.o.b. as Tuomi General Contractors, & 705981 Ontario Ltd., c.o.b. as TCL (Respondents) (*Granted*)

1637-88-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 757455 Ontario Inc. c.o.b. as Hodder Avenue Hotel (Respondent) (*Withdrawn*)

1665-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Goodfellow & Dougherty Ltd., & Peterborough Heating & Service (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

1496-87-R: United Food & Commercial Workers International Union, Local 329W (Applicant) v. Campeau Corporation (Respondent) (*Withdrawn*)

1770-88-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Peterborough Utilities Commission (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3002-87-R: Randy Foster on behalf of himself & other employees (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 1030 (Respondent) v. Dashwood Industries Ltd. (Intervener)

Unit: "all employees of Dashwood Industries Limited in the City of Kanata, Regional Municipality of Ottawa-Carleton, Province of Ontario, save and except foremen, persons above the rank of foreman, office and sales staff" (11 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	11
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	9
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	8
Ballots segregated and not counted	2

0445-88-R: George Persall, Sr. & Janitorial Department (Applicant) v. H.E.R.E. Local 75 (Respondent) v. Windsor Raceway (Intervener)

Unit: "all employees of Windsor Raceway engaged in the Janitorial Department save and except foremen, persons above the rank of foreman and persons employed for not more than 20 hours per week" (26 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	26
Number of persons who cast ballots	19
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	18

1160-88-R: Catherine Desjardins (Applicant) v. Canadian Union of Restaurant & Related Employees, Hotel Employees, Restaurant Employees, Local 88 (AFL:CIO:CLC) (Respondent) v. 764627 Ontario Limited c.o.b. as Swiss Chalet Restaurant (Intervener) (*Dismissed*)

1356-88-R: Lynn Smith et al. (Applicant) v. International Association of Machinists & Aerospace Workers (Respondent) (*Granted*)

1389-88-R: Scott Campbell (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Respondent) v. Collingwood Plumbing Ltd. (Intervener)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Collingwood Plumbing Limited in the construction industry in the County of Peterborough (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

1454-88-R: Gordon Shergold (Applicant) v. Toronto Typographical Union No. 91 (Respondent) (*Withdrawn*)

1494-88-R: Louise Forgues, on behalf of a group of employees of 656955 Ontario Limited c.o.b. as Pinecrest Nursing Home (Applicant) v. United Steelworkers of America (Respondent) v. 656955 Ontario Limited (Pinecrest Nursing Home) (Intervener) (*Withdrawn*)

1562-88-R: Anita Amell and the other employees of Local 183 S.E.U. (Applicant) v. Service Employees Union (Respondent) (*Withdrawn*)

1579-88-R: John Claridge (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Falconwin Property Management (Intervener) (*Withdrawn*)

1628-88-R: Members of Local 2447 C.U.P.E. (Applicant) v. The Canadian Union of Public Employees (Respondent) (*Withdrawn*)

1640-88-R: Ernest Valente (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC and its Local 461 (Respondent) v. Frito-Lay Canada Ltd. (Intervener) v. Group of Employees (Objectors) (*Dismissed*)

1661-88-R: Benoit Bertrand (Applicant) v. Milk, Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, Affiliated with the International Brotherhood of Teamsters Warehousemen & Helpers of America (Respondent) v. Humpty Dumpty Foods Ltd. (Intervener) (*Granted*)

1669-88-R: Manfred Keller et al (Applicant) v. I.W.A. Canada (Respondent) (*Withdrawn*)

1782-88-R: Gaetan Gagne (Applicant) v. L'Union des Teamsters, Local 91, affilié à la Fraternité International des Teamsters d'Amerique (Respondent) v. J.R. Menard Ltée (Intervener) (*Granted*)

1783-88-R: Mary Brown (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC and its Local 414 (Respondent) v. Benjamin Distribution Ltd. (Respondent) v. Group of Employees (Objectors) (*Granted*)

1841-88-R: Jean Paul Leroux (Applicant) v. Energy & Chemical Workers Union Local 848 (Respondent) (*Withdrawn*)

1878-88-R: Anita Amell et al (Applicant) v. Service Employees Union Local 183 (Respondent) v. Cer-A-Met Manufacturing Ltd. (Intervener) (*Granted*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

1537-88-M: Knob Hill Farms Limited (Employer) v. United Food & Commercial Workers Local 206 (Trade Union) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1935-88-U: Sheet Metal Workers' International Association, Local 30 (Applicant) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721, Jack Costello, James MacDonald & Lorlea Steels Ltd. (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2587-86-U: United Food & Commercial Workers Union Local 175 (Formerly Local 409) (Complainant) v. The Parking Authority of the Corporation of the City of Thunder Bay, Phillips Security Agency Inc. & Panther Security & Investigation Ltd. (Respondents) v. The Corporation of the City of Thunder Bay (Intervener #1) v. Canadian Union of Public Employees Local 87 (Intervener #2) (*Withdrawn*)

2753-87-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Western Grocers, Division of Westfair Foods Ltd. (Respondent) (*Withdrawn*)

1850-87-U: Susan Dufour (Complainant) v. Canadian Union of Public Employees Local 1001 (Respondent) (*Granted*)

2137-87-U: Leroy Anderson (Complainant) v. Graphic Communication International Union - Local 500M (Respondent) v. Couchman Trade Bindery Limited (Intervener) (*Withdrawn*)

3430-87-U: International Union of Elevator Constructors Local 90 (Complainant) v. Riverside Elevators Incorporated (Respondent) v. Christian Labour Association of Canada Local 53 (Intervener) (*Withdrawn*)

0023-88-U: Riverside Elevators Inc. (Complainant) v. International Union of Elevator Constructors Local 90 (Respondent) (*Withdrawn*)

0052-88-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Povia Carpentry Trim o/b 563808 Ontario Inc. & Labourers' International Union of North America, Local 183; F.J. Carpentry (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Granted*)

0283-88-U: Canadian Union of Restaurant & Related Employees, Hotel Employees & Restaurant Employees Union, Local 88 (Complainant) v. 412873 Ontario Limited o/a Swiss Chalet Restaurant (Respondent) (*Withdrawn*)

0295-88-U: Everette Chapelle (Complainant) v. Para Way (Division of All-Way Transportation Corp.) (Respondent) (*Dismissed*)

0301-88-U: Bakery, Confectionery & Tobacco Workers International Union, Local 264 (Complainant) v. Aloro Foods Inc. (Respondent) (*Withdrawn*)

0326-88-U: George Woolsey (Complainant) v. United Steelworkers of America Local 5595 (Bert Russell) & Algoma Steel Corporation Ltd. (Respondents) (*Withdrawn*)

0658-88-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. 704039 Ontario Limited c.o.b. as Construction 2000 (Respondent) (*Dismissed*)

0748-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Columbia Lumber Company Ltd. (Respondent) (*Withdrawn*)

0766-88-U: The Ontario Public Service Employees Union & Its Local 261 (Complainant) v. The Regional Municipality of Halton (Respondent) (*Withdrawn*)

0774-88-U: Mr. Hooshmand Baripur (Complainant) v. Diamond Taxi Unit & Executive, Mr. Harry Ghadban R.W.D.S.U. Business Agent & R.W.D.S.U. Local 1688 & International & Diamond Owner President Roger Viau & Owners & Brokers Association (Respondents) v. Mr. Victor Pring (Intervener) (*Dismissed*)

0785-88-U: Canadian Union of Public Employees Local 3236 (Complainant) v. Kristus Darzs Home for the Aged (Respondent) (*Withdrawn*)

0789-88-U: Savo Nowlackhia (Complainant) v. Metal Polishers, Buffers, Plasters Allied, International Union, Local 18 & Coro (Canada) Inc. (Respondents) (*Withdrawn*)

0802-88-U: United Brotherhood of Carpenters & Joiners of America (Complainant) v. EM Carpenters (1982) Ltd. Hi-Skill Construction Ltd. & Labourers' International Union of North America, Local 183 (Respondents) (*Withdrawn*)

0872-88-U: Energy & Chemical Workers Union (Complainant) v. J. & P. Coats Canada Inc. (Respondent) (*Withdrawn*)

0877-88-U: Leonid I. Blumin (Complainant) v. Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Associated Freezers of Canada Ltd. (Intervener) (*Dismissed*)

0882-88-U: Dieter Debowy & Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainants) v. Columbia Lumber Company Ltd. (Respondent) (*Withdrawn*)

0926-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Columbia Lumber Company Ltd., Elio Fachini & Lajos Hamos (Respondents) (*Withdrawn*)

0932-88-U: International Beverage Dispensers' & Bartenders' Union, affiliated with Hotel & Restaurant Employees & Bartenders' International Union (Complainant) v. 774395 Ontario Limited, c.o.b. Cabaret East (Respondent) (*Granted*)

0990-88-U: Hotel, Motel & Restaurant Employees Union Local 442 (Complainant) v. Berto's Restaurant Inc. (Respondent) (*Withdrawn*)

1027-88-U: Genevive Hegmans (Complainant) v. Ross Leedham & Canadian Union of Public Employees Local 1300 (Respondent) v. The Norfolk Board of Education (Intervener) (*Dismissed*)

1036-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Hoover Universal (Respondent) (*Withdrawn*)

1038-88-U: International Union of Operating Engineers & General Workers, Local 793 (Complainant) v. York Sanitation, Division of WMI Waste Management of Canada Inc. (Respondent) (*Withdrawn*)

1118-88-U: United Steelworkers of America (Complainant) v. Balloon Man of Canada, A Division of Pioneer Systems Inc. (Respondent) (*Withdrawn*)

1144-88-U: United Food & Commercial Workers International Union Local 175 (Complainant) v. Lady York Market Ltd. (Respondent) (*Withdrawn*)

1240-88-U: Canadian Textile & Chemical Union (Complainant) v. Brown Manufacturing Ltd. c.o.b. as Brown Applied Technology together with Coopers & Lybrand Ltd. (enjoined as agent for Brown Manufacturing Ltd.) (Respondent) (*Withdrawn*)

1259-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Redpath Industries Ltd. (Respondent) (*Dismissed*)

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Certification — Bargaining Unit — Trade Union Status — Applicant had existed as an association representing full-time faculty since the 1950's — Constitution amended in 1970's to make reference to academic personnel and to set up two categories of members — Motion to admit librarians to membership made after application date — Board finding that applicant a trade union — Applicant's capacity to represent professional librarians going not to trade union status but the question of whether the applicant should be certified to represent a unit which includes professional librarians — Reference to academic personnel in constitution sufficiently broad to permit applicant to represent librarians — Nothing in bylaws requiring discriminatory treatment of two categories of membership — Board officer appointed to inquire into community of interest between librarians and faculty

WILFRID LAURIER UNIVERSITY; RE WILFRID LAURIER UNIVERSITY FACULTY ASSOCIATION; RE GROUP OF EMPLOYEES(Aug.)

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evidence of membership buying — Artificial to focus on the presumed intent to repay of an
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dence was obtained when allegations not asserted in a timely fashion in accordance with
section 72 of the Board’s Rules of Procedure — Board having a discretion to hear the alle-
gations — Only prejudice asserted is the prejudice of delay — No significant delay here
because hearings continuing for the purpose of hearing non-pay allegation — Board con-
senting to the introduction of evidence with respect to the untimely allegations — Board
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CAREFUL HAND LAUNDRY AND DRY CLEANERS LIMITED; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES..... (Oct.)

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Certification — Membership Evidence — Timeliness — Employee objectors requesting an extension of the terminal date — Board exercising its discretion not to extend terminal date — Time is of the essence in certification matters — Both Form 6 and poster clearly explain how objections must be filed — Certificate issuing

MATHERS CONCRETE, PAVAGE ET BÉTONNIÈRE ST-EUSTACHE LTÉE, CARRYING ON BUSINESS AS; RE TEAMSTERS', LOCAL 230; RE DANIEL OLIVIER ON BEHALF OF A GROUP OF EMPLOYEES(Aug.)

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Certification — Natural Justice — Request by employer that panel disqualify itself on the basis that there was a reasonable apprehension of bias — Chair making remark about the evidence to that point in the hearing — Board discussing objective test — Request denied

CAREFUL HAND LAUNDRY AND DRY CLEANERS LIMITED; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES..... (Dec.)

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Certification — Petition — Practice and Procedure — Applicant filing with Board on day before hearing particulars regarding the voluntariness of a petition — Particulars referring to a series of events occurring as long as six months earlier — Applicant also requesting certification pursuant to s. 8 — Applicant's obligation to file particulars of allegations of misconduct which are intended to apply solely to the issue of the voluntariness of a petition only arises when it is advised by the Board that a petition has been filed — Particulars of s. 8 claim should have been filed with application but adjournment of case required for other reasons — Board refusing to strike that claim out merely because it could have been asserted earlier

FRAM CANADA INC.; RE C.A.W.; RE GROUP OF EMPLOYEES(Mar.)

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Certification — Petition — Practice and Procedure — Request by employee objectors to extend terminal date and post notices in Italian and Portuguese — Employees who are not proficient in English or French able to exercise their rights under the Act — Request denied — Certificates issuing

JAVID CONSTRUCTION MANAGEMENT LIMITED; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES (Sept.)

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Certification — Petition — Six separately-written letters revoking membership in union by persons who subsequently signed the petition — Little evidence concerning these letters — Board considering it relevant, appropriate and proper to consider these documents — At least one letter linking employee's perception of job security to support of union's application — Cumulative factors causing Board to doubt voluntariness of petition

GRACE VILLA CHRONIC CARE HOSPITAL; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220 S.E.I.U., A.F.L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES (Sept.)

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Certification — Petition — Timeliness — Petition left on deserted desk at Board offices after office hours on terminal date not "received" by Board in accordance with Rules — Petition untimely — Certificate issuing

DURSO STEEL LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES..... (Sept.)

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- Certification — Practice and Procedure — Pre-Hearing Vote — Applicant and incumbent requesting copies of the lists of employees filed by the employer — Voters list agreed on by parties at meeting with officer — Copy of the voters list to be given to applicant and incumbent
- SCREEN PRINT DISPLAY ADVERTISING LIMITED; RE U.S.W.A. (Apr.) 425
- Certification — Practice and Procedure — Pre-Hearing Vote — Applicant seeking leave to withdraw its certification application following a pre-hearing vote but before ballots counted — Whether six-month bar should be imposed — Board analyzing Practice Note 7 — Bar imposed
- WENTWORTH COUNTY BOARD OF EDUCATION, THE; RE O.S.S.T.F.; RE O.P.S.T.F. (Oct.) 1132
- Certification — Practice and Procedure — Pre-Hearing Vote — Board reviewing purpose of pre-hearing vote and importance of full disclosure of positions of those present at the pre-hearing vote conference with the labour relations officer — Board rejecting respondent employer's proposal that vote be delayed until non-driving brokers in separate related employer application given notice of certification application — Respondent employer objecting at officer's conference to the applicant union's being given copies of the employee and voters lists — Board directing that lists be given to union
- AIRLINE LIMOUSINE, MCDONNELL-RONALD LIMOUSINE SERVICE LIMITED OPERATING AS; RE TEAMSTERS UNION, LOCAL 938 (Nov.) 1135
- Certification — Practice and Procedure — Pre-Hearing Vote — Whether applicant union entitled to a copy of the employee list — Board analyzing nature of employee list and jurisprudence — Where applicant in a pre-hearing representation vote application requests a copy of the employee list to keep, officer should provide it — Copy of voters list provided to applicant due to stage of proceedings
- KITCHENER-WATERLOO HOSPITAL; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220, S.E.I.U., AFL:CIO:CLC (Apr.) 406
- Certification — Practice and Procedure — Union seeking to withdraw certification applications filed in 1984 — Union intending to file new ones requesting a pre-hearing vote — Respondent requesting dismissal of applications with a 10 month bar — Board dismissing without bar — Section 103(2)(i) not a penal provision
- AIRLINE LIMOUSINE, MCDONNELL-RONALD LIMOUSINE SERVICE LIMITED OPERATING AS; RE TEAMSTERS', LOCAL UNION NO. 352; RE AAROPORT LIMOUSINE SERVICES LTD. AND MCINTOSH LIMOUSINE SERVICES LTD.; RE AIRLIFT LIMOUSINE SERVICE LIMITED; RE AIR CAB LIMOUSINE SERVICES (1985) LTD.; RE GROUP OF EMPLOYEES. (Oct.) 997
- Certification — Practice and Procedure — Whether Board should refuse to entertain a subsequent application for certification filed by a previously unsuccessful applicant — First application dismissed when applicant took position that the Canada Board had jurisdiction — Second application withdrawn after applicant forgot to file its membership evidence — Board entertaining third application — No indication of abuse of Board's processes — No evidence establishing "special circumstances" which would lead Board to refuse to entertain application — Certificate issuing
- SOUTHERN EXPRESS LINES OF ONTARIO LIMITED; RE TEAMSTERS, LOCAL 938 (Oct.) 1107
- Certification — Representation Vote — Union establishing sufficient support to warrant certification without recourse to a representation vote — Board examining policy reasons warrant-

ing the additional evidence of a representation vote — Board exercising discretion to not order vote — Certificate issuing

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COOPER CANADA LIMITED; RE BREWERY, MALT & SOFT DRINK WORKERS, LOCAL 304; RE G.M.P., LOCAL 366..... (Sept.) 880

Certification — Representation Vote — Whether lead hands exercising managerial functions — One lead hand excluded from unit — Whether or not the ballots which had been ruled by the Returning Officer to be spoiled ballots were in fact spoiled ballots — Board ruling that the choice of the voters who marked the ballots in question was not clear — Ruling of Returning Officer affirmed

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Certification Where Act Contravened — Bargaining Unit — Practice and Procedure — Respondent arguing that part-time employees and students should be excluded from the unit — Respondent not having a history of employing such person but plant only in operation for a short time — Board not departing from its approach of including such persons in unit — Applicant objecting to the officer disclosing the count — Disclosure ordered — Count particularly important where s. 8 relief requested

KUHLMAN PLASTICS OF CANADA LTD.; RE U.A.W.; RE GROUP OF EMPLOYEES.....(Dec.) 1301

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Certification Where Act Contravened — Discharge for Union Activity — Evidence — Petition — Unfair Labour Practice — Board discussing relevancy of a petition in a s. 8 application — Mixed onus situation — Onus not necessarily dictating the order of proceeding — Applicant required to go first — Tape recording admissible in evidence — Layoffs and threat to close down if unionized breach of Act — Union certified

J. SOUSA CONTRACTOR LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES..... (Oct.) 1027

Certification Where Act Contravened — Evidence — Membership Evidence — Practice and Procedure — Board declining to dismiss application at preliminary stage on basis that union has membership support of only 20% — Order of proceeding determined where mixed onus — Mailed membership evidence meeting Board requirements — Form 9 declarant not subject to cross-examination in circumstances — Employer requesting that Board order advance production by union of any tape recording which it has in its possession of any statements made to employees by company officials — Board reviewing its policy on

- advance production of documents — Union ordered to produce any tapes in its possession on which it intends to rely
- ONTARIO BUS INDUSTRIES INC.; RE C.A.W.; RE GROUP OF EMPLOYEES; RE C.A.W.; RE ONTARIO BUS INDUSTRIES INC..... (Sept.) 914
- Certification Where Act Contravened — Interference in Trade Unions — Unfair Labour Practice — Employer's announcement of wage increases and other benefits, support for in-plant committee, statements made at employee meetings, support for petition and recall from layoff of most junior employee constituting contraventions of the Act — Union certified without a vote pursuant to s. 8
- KUHLMAN PLASTICS OF CANADA LTD.; RE U.A.W.; RE GROUP OF EMPLOYEES..... (Dec.) 1284
- Change in Working Conditions — Duty to Bargain in Good Faith — Interference in Trade Unions — Unfair Labour Practice — All registered nurses at retirement lodge laid off — Replacement by registered nursing assistants — Lay-off part of a larger economising measure — Lay-off not motivated by anti-union considerations — Decision to reduce staff taken after collective agreement concluded — No breach of bargaining duty or freeze — Complaint dismissed
- CENTRAL PARK LODGES, A DIVISION OF TRIZEC EQUITIES LIMITED; RE O.N.A. (May) 454
- Charges — Certification — Membership Evidence — Allegation that employee had not on his own behalf paid at least one dollar in respect of union membership fees — Co-worker having given the employee the dollar — No discussion about repayment — No "loan" indicated on Form 80 declaration — Board will not scrutinize the advance of small sums of money from one rank-and-file employee to another by way of gift or loan unless there is evidence of membership buying — Artificial to focus on the presumed intent to repay of an individual employee in respect of such a trivial though symbolic sum of money — No misstatement on Form 80
- CALVANO LUMBER & TRIM CO. LTD.; RE C.J.A., LOCAL 27.....(Aug.) 735
- Charges — Certification — Membership Evidence — Practice and Procedure — Whether Board should entertain allegations with respect to the circumstances in which membership evidence was obtained when allegations not asserted in a timely fashion in accordance with section 72 of the Board's Rules of Procedure — Board having a discretion to hear the allegations — Only prejudice asserted is the prejudice of delay — No significant delay here because hearings continuing for the purpose of hearing non-pay allegation — Board consenting to the introduction of evidence with respect to the untimely allegations — Board explaining its "usual investigation" with respect to non-pay allegations — Further hearings scheduled
- ESTONIAN RELIEF COMMITTEE IN CANADA; RE S.E.I.U., LOCAL 204 AFFILIATED WITH S.E.I.U., A.F. OF L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES.....(Nov.) 1167
- Charter of Rights and Freedoms — Certification — Constitutional Law — Employees working under conditions akin to those in a factory — Employees responsible for monitoring the development of embryonic chickens — Employees found to be persons employed in agriculture — Board having jurisdiction to entertain union's challenge that exclusion of persons employed in agriculture is contrary to the Charter — Board is a "court of competent jurisdiction"
- CUDDY CHICKS LIMITED; RE U.F.C.W., LOCAL 175 (May) 468
- Charter of Rights and Freedoms — Certification — Trade Union — Whether applicant has status

to acquire certification of security guards by reason of its affiliation with another union that admits to membership persons other than guards — CGA affiliated with USWA by virtue of a service contract — CGA found to be affiliated with USWA within the meaning of s. 12 — Listed for further hearing on issue of whether s. 12 contravenes freedom of association in Charter

PINKERTON'S OF CANADA LTD.; RE C.G.A. (June) 613

Charter of Rights and Freedoms — Collective Agreement — Construction Industry — Construction Industry Grievance — Whether the employer can rely on the Charter to challenge the union security clause in the province-wide ICI agreement — Employer not challenging the constitutional validity of the provisions of the Act which bind the employer to the collective agreement — Argument that collective agreement only binding on the employer by operation of statute and therefore subject to the Charter rejected — Board finding that collective agreement not subject to Charter scrutiny — Neither of the parties to the agreement are manifestations of government — Function of negotiating an agreement is not a governmental function — Grievance to be heard on its merits

ARLINGTON CRANE SERVICE LIMITED; RE I.U.O.E., LOCAL 793; RE OPERATING ENGINEERS EMPLOYER BARGAINING AGENCY (Dec.) 1187

Charter of Rights and Freedoms — Collective Agreement — Construction Industry — Picketing — Remedies — Strike — Unfair Labour Practice — Voluntary Recognition — Picket lines set up by Labourers Union causing members of Carpenters Union to engage in an unlawful strike — Employers struck deciding to sign collective agreements with Labourers Union — Whether a union in a legal strike position can picket other companies at geographically distinct sites when those companies are not assisting the employer with the performance of any of the struck work — Restricting picketing would be a reasonable limit within the meaning of the Charter — Picketing found to be in breach of the Act — Purpose of picketing was to induce employers to grant bargaining rights to Labourers Union — Board granting declaratory relief only — Collective agreements not nullified

BAY-TOWER HOMES COMPANY LTD., L.I.U.N.A., LOCAL 183, ET AL.; RE C.J.A., LOCAL 27 (Mar.) 259

Collective Agreement — Abandonment — Bargaining Rights — Bargaining Unit — Certification — Duty of Fair Representation — Ratification and Strike Vote — Remedies — Unfair Labour Practice — UFCW having municipal-wide bargaining rights — Employer opening up new plant in municipality — Employees in new plant told by employer they were not represented by a union — Union not consulting employees in new plant before concluding collective agreement with terms and conditions of employment alleged to be inferior — Motion brought by RWDSU to set aside collective agreement dismissed — Employees at new plant initially covered by collective agreement at old plant — Parties free to divide unit in two — Division of unit not resulting in abandonment of bargaining rights — Employees at new plant not participating in strike or ratification votes at old plant — Even if technical breach of s. 72(5), no remedial response warranted — Union breaching fair representation duty by failing to consult employees at new plant before concluding agreement and by failing to conduct a ratification vote — Whether Board has jurisdiction to set aside collective agreement as a remedy where employer not found to have violated the Act — Damages awarded but Board declining to exercise jurisdiction to set aside agreement — Certification application of RWDSU dismissed

CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC; RE U.F.C.W., LOCAL 175 AND U.F.C.W., AFL:CIO:CLC; RE JOHN HENSON, ET AL. (Dec.) 1211

Collective Agreement — Abandonment — Bargaining Rights — Certification — Incumbent union not applying terms of collective agreement while employer having financial problems — Whether 1983-85 collective agreement with an automatic renewal clause can act as a bar

to certification application — Incumbent union not abandoning bargaining rights — Collective agreement acting as a bar — Certification application dismissed

CANADA BLUE TANNING COMPANY LIMITED; RE C.A.W.; RE U.F.C.W., U.F.C.W. REGION 18 CANADA, AND ONTARIO COUNCIL OF LEATHER WORKERS, LOCAL 0-116, COBOURG (May)

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Collective Agreement — Abandonment — Bargaining Rights — Construction Industry Grievance — Whether respondent bound to Carpenters provincial agreement — Respondent operating openly without abiding by the terms of the collective agreement — Union ought to have known the respondent was active — Union doing nothing for almost 15 years — Union found to have abandoned its bargaining rights prior to the advent of provincial collective bargaining — Complaint dismissed

R. REUSSE CO. LTD.; RE C.J.A., LOCAL 27 (May)

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Collective Agreement — Abandonment — Certification — Construction Industry — Whether certification application barred by an alleged pre-existing collective agreement between the employer and the Labourers Union — Labourers Union withdrawing its intervention and choosing not to assert its bargaining rights as a bar — Board therefore finding no bar — Board also finding that Labourers Union abandoned its bargaining rights for carpenters when it withdrew its intervention — Not open to Labourers Union to refuse to defend bargaining rights which it claimed to hold where the existence of those rights have been placed directly in issue and still purport to retain them for some other purpose

CONSTRUCTION 2000, 704039 ONTARIO LIMITED CARRYING ON BUSINESS AS; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES (Oct.)

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Collective Agreement — Bargaining Rights — Construction Industry — Reconsideration — Collective agreement deemed null and void only insofar as it relates to the ICI sector

CONSTRUCTION ASSOCIATION OF THUNDER BAY INC., GENERAL CONTRACTORS' DIVISION OF THE; RE L.S.W.U., LOCAL 2693 OF THE C.J.A. AND L.I.U.N.A., LOCAL 607, AND L.I.U.N.A. PROVINCIAL DISTRICT COUNCIL; RE ONTARIO PROVINCIAL COUNCIL, C.J.A. (Mar.)

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Collective Agreement — Bargaining Unit — Certification — All employee unit relating to asphalt plant operations of the respondent — Employees in dispute doing preparation work for road construction — Board finding employees working in construction industry and covered by existing collective agreement — Employees not included in bargaining unit — Vote ordered

DIBBLEE CONSTRUCTION LIMITED; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A., LOCAL 247 (May)

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Collective Agreement — Certification — Construction Industry — Membership Evidence — Reconsideration — Voluntary Recognition — Labourers Union asking Board to reconsider a certificate it had issued to the Carpenters Union on the basis that employer was bound at time to a collective agreement with the Labourers Union covering carpenters — Collective agreement held to be a bar — Parties may enter into valid voluntary recognition agreement at a time when there is only one employee — Employee signing membership card at same time as partners not constituting employer support for union — Contractor stating to subcontractor that he had to sign with the Labourers Union not constituting employer support when Union unaware of statement — Certificates revoked

SQUARE ONE CARPENTRY INC.; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 AND SQUARE ONE CARPENTRY INC.; RE SQUARE ONE CARPENTRY AND SQUARE ONE CARPENTRY INC. (Oct.)

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- Collective Agreement — Charter of Rights and Freedoms — Construction Industry — Construction Industry Grievance — Whether the employer can rely on the Charter to challenge the union security clause in the province-wide ICI agreement — Employer not challenging the constitutional validity of the provisions of the Act which bind the employer to the collective agreement — Argument that collective agreement only binding on the employer by operation of statute and therefore subject to the Charter rejected — Board finding that collective agreement not subject to Charter scrutiny — Neither of the parties to the agreement are manifestations of government — Function of negotiating an agreement is not a governmental function — Grievance to be heard on its merits
- ARLINGTON CRANE SERVICE LIMITED; RE I.U.O.E., LOCAL 793; RE OPERATING ENGINEERS EMPLOYER BARGAINING AGENCY (Dec.) 1187
- Collective Agreement — Charter of Rights and Freedoms — Construction Industry — Picketing — Remedies — Strike — Unfair Labour Practice — Voluntary Recognition — Picket lines set up by Labourers Union causing members of Carpenters Union to engage in an unlawful strike — Employers struck deciding to sign collective agreements with Labourers Union — Whether a union in a legal strike position can picket other companies at geographically distinct sites when those companies are not assisting the employer with the performance of any of the struck work — Restricting picketing would be a reasonable limit within the meaning of the Charter — Picketing found to be in breach of the Act — Purpose of picketing was to induce employers to grant bargaining rights to Labourers Union — Board granting declaratory relief only — Collective agreements not nullified
- BAY-TOWER HOMES COMPANY LTD., L.I.U.N.A., LOCAL 183, ET AL.; RE C.J.A., LOCAL 27 (Mar.) 259
- Collective Agreement — Conciliation — Parties — Reference — Union Successor Status — Local 206 certified by Board — Local 175 requesting a conciliation officer — Whether Minister having authority to appoint a conciliation officer — Purported merger occurring before Local 206 certified — Board not having authority to declare Local 175 a successor — Minister not having authority to appoint a conciliation officer at the request of Local 175
- KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES (Aug.) 810
- Collective Agreement — Conciliation — Reference — Union taking position in prior Board matters that it was bound to collective agreement — Not open to union to argue in this matter that collective agreement not operative — Minister having no authority to appoint a conciliation officer — Parties already bound by collective agreement
- CANADIAN PNEUMATIC CONTROL CONTRACTORS ASSOCIATION (ON BEHALF OF JOHNSON CONTROLS LTD. AND LANDIS & GYR POWERS LTD.); RE U.A. (Sept.) 864
- Collective Agreement — Construction Industry — Construction Industry Grievance — Voluntary Recognition — Union and Employer entering into voluntary recognition agreement for employees engaged in concrete forming in all sectors in one Board area — Parties subsequently entering into collective agreements also limited geographically to formwork — Union local in another Board area alleging that employer was required to apply provincial ICI agreement — Employer arguing that concrete formwork was a recognized exception to the ICI scheme — Whether local formwork agreement inconsistent with statute — Whether it nevertheless creates ICI bargaining rights province-wide — Local formwork agreement declared null and void as it applies to the ICI sector — Voluntary recognition agreement, if it survives subsequent collective agreements, found to be ineffective insofar as the ICI sector is concerned — Grievances dismissed
- ROCKWALL CONCRETE FORMING (LONDON) LIMITED; RE L.I.U.N.A., LOCAL 1081 (Sept.) 963

- Collective Agreement — Construction Industry Grievance — Windsor Board of Education found to be an employer in the construction industry — Employer relying on “gentlemen’s agreement” as constituting a bar to the union’s contracting out grievance — “Gentlemen’s agreement” null and void as it applies to the ICI sector — Whether union estopped from enforcing the ICI agreement because of the existence of the “gentlemen’s agreement” — Elements of estoppel not satisfied — ICI agreement violated
- WINDSOR, THE BOARD OF EDUCATION FOR THE CITY OF; RE U.A., LOCAL 552 (Mar.) 342
- Collective Agreement — Reconsideration — Remedies — Strike — Unfair Labour Practice — Board dealing with whether return-to-work protocol contained in respondent’s proposal for a collective agreement discriminatory — Board making interim order directing the respondent to return the striking employees to work pending the disposition of the matter
- SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Mar.) 322
- Conciliation — Abandonment — Certification — Timeliness — Whether twelve month bar to certification application after appointment of conciliation officer in effect — Applicant alleging *de facto* abandonment of bargaining rights by incumbent union prior to appointment of conciliation officer — Applicant also arguing that for bar to apply there must be a reasonable expectation that the incumbent union’s bargaining rights will subsist for the twelve month period — Board finding that bar in effect — Application dismissed as untimely
- BOISE CASCADE CANADA LTD.; RE C.P.U.; RE LUMBER AND SAWMILL WORKERS’ UNION, LOCAL 2693 OF THE C.J.A.; RE I.B.E.W., LOCAL 559 ... (Jan.) 9
- Conciliation — Bargaining Rights — Construction Industry — Reference — Whether union holds bargaining rights in the non-ICI sectors of the construction industry for the employees of the employer — Board finding that bargaining rights existing — No abandonment of bargaining rights — Minister having authority to appoint a conciliation officer
- ELLIS-DON LIMITED; RE C.J.A., LOCAL 1946 (Mar.) 279
- Conciliation — Collective Agreement — Parties — Reference — Union Successor Status — Local 206 certified by Board — Local 175 requesting a conciliation officer — Whether Minister having authority to appoint a conciliation officer — Purported merger occurring before Local 206 certified — Board not having authority to declare Local 175 a successor — Minister not having authority to appoint a conciliation officer at the request of Local 175
- KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES (Aug.) 810
- Conciliation — Collective Agreement — Reference — Union taking position in prior Board matters that it was bound to collective agreement — Not open to union to argue in this matter that collective agreement not operative — Minister having no authority to appoint a conciliation officer — Parties already bound by collective agreement
- CANADIAN PNEUMATIC CONTROL CONTRACTORS ASSOCIATION (ON BEHALF OF JOHNSON CONTROLS LTD. AND LANDIS & GYR POWERS LTD.); RE U.A. (Sept.) 864
- Constitutional Law — Certification — Charter of Rights and Freedoms — Employees working under conditions akin to those in a factory — Employees responsible for monitoring the development of embryonic chickens — Employees found to be persons employed in agriculture — Board having jurisdiction to entertain union’s challenge that exclusion of persons employed in agriculture is contrary to the Charter — Board is a “court of competent jurisdiction”
- CUDDY CHICKS LIMITED; RE U.F.C.W., LOCAL 175 (May) 468

Constitutional Law — Certification — Construction Industry — Respondent contracting with St. Lawrence Seaway Authority to rehabilitate portions of the Welland Canal — Whether employees of the respondent engaged in construction falling within provincial jurisdiction — Board having jurisdiction to entertain certification application

PETER KIEWIT SONS CO. LTD.; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A.,
ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793, C.J.A.,
LOCAL 38; RE GROUP OF EMPLOYEES (May) 510

Constitutional Law — Certification — Whether Board having constitutional jurisdiction over the labour relations at a duty-free shop at a bridge border crossing — Pervasive federal regulation not touching upon labour relations matters — Operation not a federal business, work or undertaking nor is it integrally connected to a federal undertaking — Board having jurisdiction

BLUE WATER BRIDGE DUTY FREE SHOP INC.; RE ONTARIO LIQUOR
BOARD EMPLOYEES' UNION (Feb.) 109

Constitutional Law — Certification — Whether there is a category of employees of Ontario Hydro who are employed on or in connection with works which by s. 17 of the *Atomic Energy Control Act* have been declared to be works for the general advantage of Canada — Board finding such a category exists and therefore Board having no jurisdiction to include these persons in any bargaining unit

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL
AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E.-C.L.C. ONTARIO HYDRO
EMPLOYEES UNION LOCAL 1000; RE THE COALITION TO STOP CERTIFICA-
TION OF THE SOCIETY ON BEHALF OF CERTAIN EMPLOYEES TOM STE-
VENS, ET AL. (Feb.) 187

Construction Industry — Abandonment — Certification — Collective Agreement — Whether certification application barred by an alleged pre-existing collective agreement between the employer and the Labourers Union — Labourers Union withdrawing its intervention and choosing not to assert its bargaining rights as a bar — Board therefore finding no bar — Board also finding that Labourers Union abandoned its bargaining rights for carpenters when it withdrew its intervention — Not open to Labourers Union to refuse to defend bargaining rights which it claimed to hold where the existence of those rights have been placed directly in issue and still purport to retain them for some other purpose

CONSTRUCTION 2000, 704039 ONTARIO LIMITED CARRYING ON BUSINESS
AS; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE GROUP OF
EMPLOYEES (Oct.) 1017

Construction Industry — Adjournment — Construction Industry Grievance — Natural Justice — Practice and Procedure — Related Employer — Sale of a Business — Witness — Board not permitting respondent in sale of a business application to be added as a respondent in a construction industry grievance where liability had already been determined — Adjournment request based on unavailability of counsel dismissed — Adjournment request based on hospitalization of key witness granted — Board fixing further hearing dates on peremptory basis — Adjournment of those dates on consent of all parties denied — Board dismissing allegations of bias and breach of rules of natural justice — Contempt of witness purged

- by his answering questions put to him — Sale of a business and related employer applications dismissed
- RINO ZANETTE (1981) LTD.; RE L.I.U.N.A., LOCAL 607; RE L.I.U.N.A., LOCAL 607; RE RINO ZANETTE (1981) LTD., SAULT HOLDINGS LIMITED, ZANETTE INVESTMENTS INC., AND 444348 ONTARIO LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 607; RE RINO ZANETTE LIMITED, RINO ZANETTE (1981) LTD., 444348 ONTARIO LIMITED, ZANETTE INVESTMENTS INC., SAULT HOLDINGS LIMITED (Sept.) 923
- Construction Industry — Bargaining Rights — Certification — Intimidation and Coercion — Reconsideration — Unfair Labour Practice — Intervener requesting that Board revoke certificates issued to applicant on basis that intervener had a collective agreement with the respondent employer at time certificates issued — Whether agreement void due to employer support — Agreement signed following a recognition strike — Collective agreement deemed void — Reconsideration denied.
- F.T. CONSTRUCTION INC.; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 (Feb.) 141
- Construction Industry — Bargaining Rights — Collective Agreement — Reconsideration — Collective agreement deemed null and void only insofar as it relates to the ICI sector
- CONSTRUCTION ASSOCIATION OF THUNDER BAY INC., GENERAL CONTRACTORS' DIVISION OF THE; RE L.S.W.U., LOCAL 2693 OF THE C.J.A. AND L.I.U.N.A., LOCAL 607, AND L.I.U.N.A. PROVINCIAL DISTRICT COUNCIL; RE ONTARIO PROVINCIAL COUNCIL, C.J.A.....(Mar.) 277
- Construction Industry — Bargaining Rights — Conciliation — Reference — Whether union holds bargaining rights in the non-ICI sectors of the construction industry for the employees of the employer — Board finding that bargaining rights existing — No abandonment of bargaining rights — Minister having authority to appoint a conciliation officer
- ELLIS-DON LIMITED; RE C.J.A., LOCAL 1946.....(Mar.) 279
- Construction Industry — Bargaining Unit — Certification — Bargaining unit of construction labourers — Inappropriate to grant clarity note referring to truck drivers and machine operators — Certificates issuing
- STREET CONSTRUCTION LIMITED; RE L.I.U.N.A., LOCAL 183(Jan.) 94
- Construction Industry — Bargaining Unit — Certification — CLAC applying under s. 144(5) to displace the Sheet Metal Workers province-wide ICI craft bargaining unit — Board practice is to give CLAC all unrepresented trades employed in a Board area without reference to sector — Board determining that CLAC can obtain bargaining rights for a craft on a displacement application — CLAC can also limit application to the ICI sector where it is displacing another union — Bargaining rights limited to Board area — Vote counted
- REITZEL HEATING & SHEET METAL LTD.; RE C.L.A.C.; RE S.M.W., LOCAL 562 (Dec.) 1310
- Construction Industry — Bargaining Unit — Certification — Dependent Contractor — Respondent asserting that appropriate unit should consist of dependent contractors working as painters in the construction industry — Board finding conflict between dependent contractor provision and province-wide bargaining sections in Act — Dependent contractors cannot constitute a separate bargaining unit — More than one provincial unit prohibited — Standard unit found appropriate
- LAY-ALL DRYWALL LTD.; RE P.A.T., LOCAL 1891(Mar.) 308
- Construction Industry — Bargaining Unit — Certification — Employer engaged in the retrofit of

wall facings and window openings — Some employees working in shop bending flashing and fabricating other metal products destined for project — Employees not working exclusively in shop — Board finding that sheet metal shop employees commonly associated in their work with on site employees — Shop employees falling within bargaining unit description

RAINSOON METAL SYSTEMS INCORPORATED; RE S.M.W.,
LOCAL 30.....(Nov.) 1180

Construction Industry — Bargaining Unit — Certification — Five individuals on list of employees in dispute — Whether Board should determine as a preliminary matter whether one disputed individual with respect to whom the intervener had filed membership evidence was an employee before addressing issue with respect to the other four — Board ruled it would hear the representations of the parties with respect to all five of the individuals in dispute — Board considering “other relevant factor” phrase in *E & E Seegmiller* — Persons in dispute employed as servicemen and doing the work of several trades — Board determining whether persons working as construction labourers or carpenters where two trade jurisdictions overlap — Certificates issuing

RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183..... (Sept.) 976

Construction Industry — Bargaining Unit — Certification — Parties agreeing to bargaining unit described as including all “registered” electricians — Designation order not using word “registered” — Board using language in designation order — No need to adjudicate dispute between parties as to whether certain persons are employees because union entitled to certification in any event — Certificates issuing

SUPERIOR CONTRACTING, 510706 ONTARIO LIMITED, OPERATING AS; RE I.B.E.W., LOCAL 1687 (Dec.) 1348

Construction Industry — Bargaining Unit — Certification — Petition — Whether two persons falling within unit of journeymen sheet metal workers and registered sheet metal apprentices — Persons were registered in Quebec and had inquired as to how to register in Ontario — Persons excluded from unit — Petition circulated by working foreman not given any weight — Certificates issuing

B.C. MECK, 99538 CANADA INC., C.O.B. AS; RE S.M.W., LOCAL 47; RE RENÉ PICHE ON HIS OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF B.C. MECK..... (June) 546

Construction Industry — Bargaining Unit — Certification — Principles enunciated in *Gilvesy* confirmed — Employees primarily engaged in the repairing of equipment falling within unit — Mechanics repairing equipment both on and off the construction sites — Board finding that mechanics who regularly perform both repair work at the construction site and in the shop are commonly associated in their work with on-site employees and are therefore in the operating engineers bargaining unit — Mechanics in issue falling within unit — Vote ordered

BILL BROWNLEE EXCAVATING LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES (Apr.) 364

Construction Industry — Bargaining Unit — Certification — Reconsideration — Board declining to reconsider its decision to include shop mechanics in a construction industry bargaining unit — Board also confirming its application of *Gilvesy*

BILL BROWNLEE EXCAVATING LIMITED; RE I.U.O.E., LOCAL 793;..... (July) 645

Construction Industry — Bargaining Unit — Certification — Whether Board should issue a clar-

ity note declaring that welders working in the plumbing and steamfitting trades are included in plumbers bargaining unit — Hearing directed to inquire into issue

HERITAGE MECHANICAL LTD.; RE U.A., LOCAL 46 (June) 596

Construction Industry — Bargaining Unit — Certification — Whether the collective agreement between MTABA and Labourers Union with respect to the construction of apartment buildings covers carpenters and carpenters apprentices — Issue determined in prior proceeding — *Res judicata* not applicable because different parties — Employees in issue not covered by MTABA agreement — Whether Carpenters Union can carve out its craft from concrete forming agreement — Board discussing its displacement policy — Carpenters Union permitted to carve out its craft

ELLIS-DON LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE THE FORM WORK COUNCIL OF ONTARIO; RE METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION; RE MILNE & NICHOLLS LTD.; RE MOLLENHAUER LIMITED (Dec.) 1254

Construction Industry — Certification — Collective Agreement — Membership Evidence — Reconsideration — Voluntary Recognition — Labourers Union asking Board to reconsider a certificate it had issued to the Carpenters Union on the basis that employer was bound at time to a collective agreement with the Labourers Union covering carpenters — Collective agreement held to be a bar — Parties may enter into valid voluntary recognition agreement at a time when there is only one employee — Employee signing membership card at same time as partners not constituting employer support for union — Contractor stating to sub-contractor that he had to sign with the Labourers Union not constituting employer support when Union unaware of statement — Certificates revoked

SQUARE ONE CARPENTRY INC.; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 AND SQUARE ONE CARPENTRY INC.; RE SQUARE ONE CARPENTRY AND SQUARE ONE CARPENTRY INC. (Oct.) 1112

Construction Industry — Certification — Constitutional Law — Respondent contracting with St. Lawrence Seaway Authority to rehabilitate portions of the Welland Canal — Whether employees of the respondent engaged in construction falling within provincial jurisdiction — Board having jurisdiction to entertain certification application

PETER KIEWIT SONS CO. LTD.; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793, C.J.A., LOCAL 38; RE GROUP OF EMPLOYEES (May) 510

Construction Industry — Certification — Construction industry certification application converted to an application under the general provision of the Act on agreement of the parties — Certificate issued pursuant to general provisions — Union now seeking construction industry bargaining rights — *Res judicata* not applicable — Case relisted for determination of issue of whether employer is an employer in the construction industry

ENGINEERED ELECTRIC CONTROLS LIMITED; RE I.B.E.W., LOCAL 804. (Feb.) 138

Construction Industry — Certification — Employer — Full-time employees of the company to whom the respondent had sub-contracted work performing work for the respondent on the application date — Employees working contrary to moonlighting provision in collective agreement — Employees properly falling within bargaining unit — Certificates issuing

SIRFRAN CONSTRUCTION MANAGERS INC.; RE P.A.T., LOCAL 1824 (May) 529

Construction Industry — Certification — Employer — Respondent hotel entering into arrangement with masonry apprentice to construct exterior masonry walls of an extension on the hotel — Respondent hotel found to be the employer rather than the contractor — Respon-

dent hotel operating a business in the construction industry — Whether apprentice and others independent contractors to be determined at a later hearing

TRAVELERS MOTOR INN, 542590 ONTARIO LTD. C.O.B. AS; RE B.A.C.; RE L.I.U.N.A., LOCAL 1081 (Feb.) 206

Construction Industry — Certification — Employer — Respondent involved principally in the manufacture, sale and installation of industrial boilers — Respondent entering into contract to install generating plant — Construction of building subcontracted but respondent moving mobile trailers to site for use as offices and storage — Trailers affixed to the land by labourers hired by the respondent — Board finding that the respondent is an employer who operates a business in the construction industry — Certificates issuing

VOLCANO INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL (Jan.) 97

Construction Industry — Certification — Interference in Trade Unions — Intimidation and Coercion — Unfair Labour Practice — Principal of employer told employees that it would be better if they joined the Labourers Union rather than the Carpenters Union — Breach of sections 64 and 70 — No evidence that Labourers Union participated in the employer's improper actions — Section 13 not applicable — Board declining to dismiss certification application

POVOA CARPENTRY TRIM, OB 563808 ONTARIO INC. AND L.I.U.N.A., LOCAL 183, F.J. CARPENTRY; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183..... (Nov.) 1174

Construction Industry — Certification — Intimidation and Coercion — Unfair Labour Practice — Whether persons not legally employed in Canada ought to be considered employees under the Act — Status of persons under the *Immigration Act* irrelevant to determinations under the *Labour Relations Act* — Persons found to be employees of the respondent — Intimidation by union organizer causing Board to order vote

MASTERS CONSTRUCTION LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL (Feb.) 162

Construction Industry — Certification — Membership Evidence — Parties advised at hearing that two membership cards did not contain the local number and one had only been signed on the receipt portion — Form 80 disclosing no exceptions — Board not granting leave to file an amended Form 80 declaration given the importance of the document — Two cards without local number not reliable membership evidence — Card containing signature on receipt portion only acceptable — Respondent employer's name on card not required — Form 80 proper given the defects in question — Working foreman found not to be an employee for purposes of the application because he exercises managerial functions — Vote ordered

P. & M. ELECTRIC (1982) LTD.; RE I.B.E.W., LOCAL 353; RE GROUP OF EMPLOYEES (Aug.) 843

Construction Industry — Certification — Natural Justice — Practice and Procedure — Board required to determine whether collective agreement bar to certification application — Board receiving *viva voce* and documentary evidence on that issue but insufficient time to receive oral submissions — Written submission requested — Intervener objecting to being deprived of opportunity of making oral submissions — Board considering factors such as its power to determine its own practice and procedure, the parties having had the opportunity of presenting witnesses, and expedition — Board ordering that written submissions be filed

CONSTRUCTION 2000, 704039 ONTARIO LIMITED, CARRYING ON BUSINESS AS; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES (Aug.) 749

Construction Industry — Certification — Parties — Practice and Procedure — Petitioner attend-

- ing hearing as an observer but not participating — No notice of continuation of hearing sent to petitioner — Whether Board should adjourn in order for notice to be given — Petitioner not entitled to notice of continuation of hearing — One must attend hearing as a party in order to receive notice — Certificates issuing — Board directing that petitioner be sent copy of the decision
- PETER KIEWIT SONS CO. LTD.; RE I.U.O.E., LOCAL 793; RE EMPLOYEE .. (July) 688
- Construction Industry — Certification — Petition — Practice and Procedure — Representative of petitioners disruptive during hearing — Individual excluded from hearing room pursuant to *Statutory Powers Procedure Act* — Petition not voluntary — Certificates issuing
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ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE (Dec.)

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Dependent Contractor — Bargaining Unit — Certification — Construction Industry — Respondent asserting that appropriate unit should consist of dependent contractors working as painters in the construction industry — Board finding conflict between dependent contractor provision and province-wide bargaining sections in Act — Dependent contractors cannot constitute a separate bargaining unit — More than one provincial unit prohibited — Standard unit found appropriate

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Dependent Contractor — Bargaining Unit — Certification — Parties agreeing on all employee bargaining unit description but disagreeing as to whether certain persons ought to be excluded — Regardless of the outcome of this issue union entitled to certification — Interim certificate issuing pending determination of issue of whether these persons are dependent contractors and therefore entitled to a distinct unit

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AIRLINE LIMOUSINE, MCDONNELL-RONALD LIMOUSINE SERVICE LIMITED, OPERATING AS; RE TEAMSTERS UNION, LOCAL 352; RE AAROPORT LIMOUSINE SERVICES LTD., ET AL. (Mar.)

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Discharge — Health and Safety — Remedy — Furniture handler discharged for refusing to lift hutch — Worker feared his back would be injured — Another worker lifted hutch — OHSA violated — Worker had reasonable grounds to refuse to lift the hutch without assistance — Other worker not injuring himself not much help in determining whether reason-

able grounds — Worker admitting he would have left job soon anyway — Compensation only awarded

ART SHOPPE; RE MARK ENGLEDEEN(Aug.) 729

Discharge for Union Activity — Certification Where Act Contravened — Evidence — Petition — Unfair Labour Practice — Board discussing relevancy of a petition in a s. 8 application — Mixed onus situation — Onus not necessarily dictating the order of proceeding — Applicant required to go first — Tape recording admissible in evidence — Layoffs and threat to close down if unionized breach of Act — Union certified

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CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC; RE U.F.C.W., LOCAL 175 AND U.F.C.W., AFL:CIO:CLC; RE JOHN HENSON, ET AL. (Dec.) 1211

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Duty of Fair Representation — Parties — Unfair Labour Practice — Whether complainant an employee in the bargaining unit — Complainant a union member but parties never intended to have such an employee covered by the collective agreement — Board finding complainant not an employee in the unit — Complaint would not be successful even if the complainant did have status to bring it

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Duty of Fair Representation — Settlement — Unfair Labour Practice — Complaint settled but terms not reduced to writing — Term of settlement that complainant would withdraw complaint — Inquiring into the merits of the complaint might have a deleterious effect on the Board's settlement process — Complaint dismissed

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- of criteria in the exercise of its discretion — Board directing that work shall continue to be assigned to the C.P.U.
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- Jurisdiction Dispute — Natural Justice — Practice and Procedure — Reconsideration — Strike — Whether refusal of an interim order without either a formal hearing or consultation amounts to a denial of fundamental justice — No necessity for formal hearing — Board having no obligation to consult if pleadings do not disclose a basis for making an interim order — Reconsideration dismissed
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- NEWMARCH MECHANICAL LIMITED AND U.A., LOCAL 463; RE B.S.O.I.W., LOCAL 721 (Aug.) 840
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- MAXIBO INCORPORATED AND C.J.A., LOCAL 18; RE L.I.U.N.A., LOCAL 837 (Aug.) 835
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- COPPER CLIFF MECHANICAL CONTRACTORS LTD.; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO, THE, C.J.A., LOCAL 1425, IRONWORKERS DISTRICT COUNCIL & B.S.O.I.W., LOCAL 786 (June) 565
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English — Cases indicating that either all-inclusive unit or separate unit of Part XI occasional teachers appropriate — Sufficient community of interest for all-inclusive unit here

FRONTENAC-LENNOX AND ADDINGTON COUNTY ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION (Sept.)

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Membership Evidence — Certification — Charges — Allegation that employee had not on his own behalf paid at least one dollar in respect of union membership fees — Co-worker having given the employee the dollar — No discussion about repayment — No “loan” indicated on Form 80 declaration — Board will not scrutinize the advance of small sums of money from one rank-and-file employee to another by way of gift or loan unless there is evidence of membership buying — Artificial to focus on the presumed intent to repay of an individual employee in respect of such a trivial though symbolic sum of money — No misstatement on Form 80

CALVANO LUMBER & TRIM CO. LTD.; RE C.J.A., LOCAL 27.....(Aug.)

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Membership Evidence — Certification — Charges — Practice and Procedure — Whether Board should entertain allegations with respect to the circumstances in which membership evidence was obtained when allegations not asserted in a timely fashion in accordance with section 72 of the Board's Rules of Procedure — Board having a discretion to hear the allegations — Only prejudice asserted is the prejudice of delay — No significant delay here because hearings continuing for the purpose of hearing non-pay allegation — Board consenting to the introduction of evidence with respect to the untimely allegations — Board explaining its “usual investigation” with respect to non-pay allegations — Further hearings scheduled

ESTONIAN RELIEF COMMITTEE IN CANADA; RE S.E.I.U., LOCAL 204 AFFILIATED WITH S.E.I.U., A.F. OF L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES.....(Nov.)

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Membership Evidence — Certification — Collective Agreement — Construction Industry — Reconsideration — Voluntary Recognition — Labourers Union asking Board to reconsider a certificate it had issued to the Carpenters Union on the basis that employer was bound at time to a collective agreement with the Labourers Union covering carpenters — Collective agreement held to be a bar — Parties may enter into valid voluntary recognition agreement at a time when there is only one employee — Employee signing membership card at same time as partners not constituting employer support for union — Contractor stating to subcontractor that he had to sign with the Labourers Union not constituting employer support when Union unaware of statement — Certificates revoked

SQUARE ONE CARPENTRY INC.; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 AND SQUARE ONE CARPENTRY INC.; RE SQUARE ONE CARPENTRY AND SQUARE ONE CARPENTRY INC..... (Oct.)

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Membership Evidence — Certification — Construction Industry — Parties advised at hearing that two membership cards did not contain the local number and one had only been signed on the receipt portion — Form 80 disclosing no exceptions — Board not granting leave to file an amended Form 80 declaration given the importance of the document — Two cards without local number not reliable membership evidence — Card containing signature on receipt portion only acceptable — Respondent employer's name on card not required — Form 80 proper given the defects in question — Working foreman found not to be an employee for purposes of the application because he exercises managerial functions — Vote ordered

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 PEBRA PETERBOROUGH INC.; RE PEBRA PETERBOROUGH EMPLOYEES ASSOCIATION; RE C.A.W..... (Jan.) 76
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- Membership Evidence — Certification — Timeliness — Employee objectors requesting an extension of the terminal date — Board exercising its discretion not to extend terminal date — Time is of the essence in certification matters — Both Form 6 and poster clearly explain how objections must be filed — Certificate issuing
 MATHERS CONCRETE, PAVAGE ET BÉTONNIÈRE ST-EUSTACHE LTÉE, CARRYING ON BUSINESS AS; RE TEAMSTERS', LOCAL 230; RE DANIEL OLIVIER ON BEHALF OF A GROUP OF EMPLOYEES (Aug.) 830
- Membership Evidence — Certification Where Act Contravened — Evidence — Practice and Procedure — Board declining to dismiss application at preliminary stage on basis that union has membership support of only 20% — Order of proceeding determined where mixed onus — Mailed membership evidence meeting Board requirements — Form 9 declarant not subject to cross-examination in circumstances — Employer requesting that Board order advance production by union of any tape recording which it has in its possession of any statements made to employees by company officials — Board reviewing its policy on advance production of documents — Union ordered to produce any tapes in its possession on which it intends to rely
 ONTARIO BUS INDUSTRIES INC.; RE C.A.W.; RE GROUP OF EMPLOYEES; RE C.A.W.; RE ONTARIO BUS INDUSTRIES INC..... (Sept.) 914
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 CAN-ENG METAL TREATING LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES..... (May) 444
- Natural Justice — Adjournment — Construction Industry — Construction Industry Grievance — Practice and Procedure — Related Employer — Sale of a Business — Witness — Board not permitting respondent in sale of a business application to be added as a respondent in a construction industry grievance where liability had already been determined — Adjourn-

ment request based on unavailability of counsel dismissed — Adjournment request based on hospitalization of key witness granted — Board fixing further hearing dates on peremptory basis — Adjournment of those dates on consent of all parties denied — Board dismissing allegations of bias and breach of rules of natural justice — Contempt of witness purged by his answering questions put to him — Sale of a business and related employer applications dismissed

RINO ZANETTE (1981) LTD.; RE L.I.U.N.A., LOCAL 607; RE L.I.U.N.A., LOCAL 607; RE RINO ZANETTE (1981) LTD., SAULT HOLDINGS LIMITED, ZANETTE INVESTMENTS INC., AND 444348 ONTARIO LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 607; RE RINO ZANETTE LIMITED, RINO ZANETTE (1981) LTD., 444348 ONTARIO LIMITED, ZANETTE INVESTMENTS INC., SAULT HOLDINGS LIMITED (Sept.)

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CONSTRUCTION 2000, 704039 ONTARIO LIMITED, CARRYING ON BUSINESS AS; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES.....(Aug.)

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Natural Justice — Certification — Request by employer that panel disqualify itself on the basis that there was a reasonable apprehension of bias — Chair making remark about the evidence to that point in the hearing — Board discussing objective test — Request denied

CAREFUL HAND LAUNDRY AND DRY CLEANERS LIMITED; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES.....(Dec.)

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Natural Justice — Jurisdiction Dispute — Practice and Procedure — Reconsideration — Strike — Whether refusal of an interim order without either a formal hearing or consultation amounts to a denial of fundamental justice — No necessity for formal hearing — Board having no obligation to consult if pleadings do not disclose a basis for making an interim order — Reconsideration dismissed

NEWMARCH MECHANICAL LIMITED AND U.A., LOCAL 463; RE B.S.O.I.W., LOCAL 721(Aug.)

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Parties — Certification — Construction Industry — Practice and Procedure — Petitioner attending hearing as an observer but not participating — No notice of continuation of hearing sent to petitioner — Whether Board should adjourn in order for notice to be given — Petitioner not entitled to notice of continuation of hearing — One must attend hearing as a party in order to receive notice — Certificates issuing — Board directing that petitioner be sent copy of the decision

PETER KIEWIT SONS CO. LTD.; RE I.U.O.E., LOCAL 793; RE EMPLOYEE .. (July)

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Parties — Collective Agreement — Conciliation — Reference — Union Successor Status — Local 206 certified by Board — Local 175 requesting a conciliation officer — Whether Minister having authority to appoint a conciliation officer — Purported merger occurring before

Local 206 certified — Board not having authority to declare Local 175 a successor — Minister not having authority to appoint a conciliation officer at the request of Local 175

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES(Aug.)

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Parties — Construction Industry — Duty of Fair Representation — Unfair Labour Practice — Constituent organization of the employer bargaining agency alleging breach of fair representation duty by employer bargaining agency — Duty owed to individual employers only — Employer organization not a proper complainant

GRAND VALLEY CONSTRUCTION ASSOCIATION (GENERAL CONTRACTORS SECTION), T.E. TAYLOR CONSTRUCTION LTD., XDG LTD.; RE LABOUR RELATIONS BUREAU OF THE ONTARIO GENERAL CONTRACTORS ASSOCIATION, ONTARIO MASONRY CONTRACTORS ASSOCIATION, INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA, WATER PROOFING CONTRACTORS ASSOCIATION OF ONTARIO, CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO, JAMES THOMSON AND PROVINCIAL EMPLOYER BARGAINING AGENCY — LABOURERS; RE LABOURERS EMPLOYEE BARGAINING AGENCY (June)

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Parties — Duty of Fair Representation — Unfair Labour Practice — Whether complainant an employee in the bargaining unit — Complainant a union member but parties never intended to have such an employee covered by the collective agreement — Board finding complainant not an employee in the unit — Complaint would not be successful even if the complainant did have status to bring it

VANDETTE, DELPHIS W.; RE THE CORPORATION OF THE TOWNSHIP OF ST. JOSEPH, AND L.I.U.N.A., LOCAL 1036 (Feb.)

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Parties — Interference in Trade Unions — Unfair Labour Practice — Complainant an unsuccessful applicant for a job as an equipment operator — Discussions with job applicants alleged to breach prohibition in Act against individual bargaining — No breach of Act — Employee not having status to allege violations of sections 50 and 67

ST. JOSEPH, THE CORPORATION OF THE TOWNSHIP OF, AND L.I.U.N.A., LOCAL 1036; RE DELPHIS W. VANDETTE (Feb.)

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Parties — Petition — Termination — Timeliness — Application filed on same day as Minister appointed conciliation officer timely — Applicant having status to bring application as an employee in the bargaining unit although not a member in good standing of the union — Vote ordered

IDEAL RAILINGS LTD.; RE EVARISTO ROMERO; RE C.J.A., LOCAL 27..... (July)

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Parties — Practice and Procedure — Termination — Termination application referring to District Council and one local — Province-wide agreement naming District Council and all affiliated union locals as parties — International, District Council and all affiliated union locals necessary parties — Applicant allowed to amend title of application to include all those local unions named in the collective agreement as respondents

DOUBLE S CONSTRUCTION, 657572 ONTARIO INC. C.O.B. AS; RE MICHAEL VAN LANDEGHEM, TRACY VAN LANDEGHEM AND TERRY MANZUTTI; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNION L.I.U.N.A., LOCAL 1036.....(Aug.)

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Parties — Sector Determination — Whether persons having status to participate in a sectoral

determination hearing — Person must have a direct connection with the project — Union entitled to intervene

BOARD OF GOVERNORS OF EXHIBITION PLACE, THE; RE U.A., LOCAL 46;
RE L.I.U.N.A., LOCAL 183..... (June) 560

Petition — Bargaining Unit — Certification — Construction Industry — Whether two persons falling within unit of journeymen sheet metal workers and registered sheet metal apprentices — Persons were registered in Quebec and had inquired as to how to register in Ontario — Persons excluded from unit — Petition circulated by working foreman not given any weight — Certificates issuing

B.C. MECK, 99538 CANADA INC., C.O.B. AS; RE S.M.W., LOCAL 47; RE RENÉ PICHÉ ON HIS OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF B.C. MECK..... (June) 546

Petition — Certification — Construction Industry — Practice and Procedure — Representative of petitioners disruptive during hearing — Individual excluded from hearing room pursuant to *Statutory Powers Procedure Act* — Petition not voluntary — Certificates issuing

ALLIED PAINTING CONTRACTORS, 389188 ONTARIO LTD., CARRYING ON BUSINESS AS; RE P.A.T., LOCAL 1824; RE GROUP OF EMPLOYEES..... (Sept.) 859

Petition — Certification — Practice and Procedure — Applicant filing with Board on day before hearing particulars regarding the voluntariness of a petition — Particulars referring to a series of events occurring as long as six months earlier — Applicant also requesting certification pursuant to s. 8 — Applicant's obligation to file particulars of allegations of misconduct which are intended to apply solely to the issue of the voluntariness of a petition only arises when it is advised by the Board that a petition has been filed — Particulars of s. 8 claim should have been filed with application but adjournment of case required for other reasons — Board refusing to strike that claim out merely because it could have been asserted earlier

FRAM CANADA INC.; RE C.A.W.; RE GROUP OF EMPLOYEES (Mar.) 286

Petition — Certification — Practice and Procedure — Request by employee objectors to extend terminal date and post notices in Italian and Portuguese — Employees who are not proficient in English or French able to exercise their rights under the Act — Request denied — Certificates issuing

JAVID CONSTRUCTION MANAGEMENT LIMITED; RE L.I.U.N.A., LOCAL 183;
RE GROUP OF EMPLOYEES (Sept.) 906

Petition — Certification — Six separately-written letters revoking membership in union by persons who subsequently signed the petition — Little evidence concerning these letters — Board considering it relevant, appropriate and proper to consider these documents — At least one letter linking employee's perception of job security to support of union's application — Cumulative factors causing Board to doubt voluntariness of petition

GRACE VILLA CHRONIC CARE HOSPITAL; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220 S.E.I.U., A.F.L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES (Sept.) 894

Petition — Certification — Timeliness — Petition left on deserted desk at Board offices after office hours on terminal date not "received" by Board in accordance with Rules — Petition untimely — Certificates issuing

DURSO STEEL LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES..... (Sept.) 883

Petition — Certification Where Act Contravened — Discharge for Union Activity — Evidence — Unfair Labour Practice — Board discussing relevancy of a petition in a s. 8 application —

Mixed onus situation — Onus not necessarily dictating the order of proceeding — Applicant required to go first — Tape recording admissible in evidence — Layoffs and threat to close down if unionized breach of Act — Union certified

J. SOUSA CONTRACTOR LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES..... (Oct.)

1027

Petition — Parties — Termination — Timeliness — Application filed on same day as Minister appointed conciliation officer timely — Applicant having status to bring application as an employee in the bargaining unit although not a member in good standing of the union — Vote ordered

IDEAL RAILINGS LTD.; RE EVARISTO ROMERO; RE C.J.A., LOCAL 27..... (July)

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Petition — Termination — Fifty percent of bargaining unit comprised of employees who were closely related to the owners of the business — Signatures of family members on petition found voluntary — Vote ordered

KING GEORGE HOTEL, REAL DELAGE; RE GILLES DELAGE; RE HOTELS, CLUBS, RESTAURANTS AND TAVERNS EMPLOYEES' UNION, LOCAL 261 (Dec.)

1278

Picketing — Charter of Rights and Freedoms — Collective Agreement — Construction Industry — Remedies — Strike — Unfair Labour Practice — Voluntary Recognition — Picket lines set up by Labourers Union causing members of Carpenters Union to engage in an unlawful strike — Employers struck deciding to sign collective agreements with Labourers Union — Whether a union in a legal strike position can picket other companies at geographically distinct sites when those companies are not assisting the employer with the performance of any of the struck work — Restricting picketing would be a reasonable limit within the meaning of the Charter — Picketing found to be in breach of the Act — Purpose of picketing was to induce employers to grant bargaining rights to Labourers Union — Board granting declaratory relief only — Collective agreements not nullified

BAY-TOWER HOMES COMPANY LTD., L.I.U.N.A., LOCAL 183, ET AL.; RE C.J.A., LOCAL 27..... (Mar.)

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Picketing — Construction Industry — Strike — General contractor resubcontracting work to non-union employees in the face of the Carpenters' Union lawful province-wide strike — Carpenters' Union establishing picket line at subcontractor's primary job site — Picket line honoured by other unionized trades — Picketing of general contractor's job site by Carpenters' Union held to be in connection with a lawful strike — Application for a direction of unlawful strike dismissed

SUTHERLAND-SCHULTZ LTD.; RE C.J.A., LOCAL 785 AND KARL BALL, U.A., LOCAL 527, AL STEFFLER, JIM HILKER, TED BENEDICT, RON HALLMAN, GARY ARNOTT AND KEITH ACTON, I.B.E.W., LOCAL 804, WAYNE LEHMAN, WALTER SCHLUETER, DAVID WORTON AND PETER WEBER, I.U.O.E., LOCAL 793 AND RON HUNT (June)

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Practice and Procedure — Accreditation — Whether Board should continue its practice of compiling a list of employers referred to in accreditation decisions as Final Schedule F — Final Schedule F consists of those employers who have not employed any of the represented employees within the year prior to the date of making the application — Board not compiling Final Schedule F — Board issuing accreditation certificate to applicant for all employees

of construction labourers employed in the roads, sewers and watermains, and heavy engineering sectors in Board area 15

NATIONAL CAPITAL ROADBUILDERS ASSOCIATION; RE L.I.U.N.A., LOCAL 527; RE PIPE LINE CONTRACTORS ASSOCIATION OF CANADA; RE OTTAWA CONSTRUCTION ASSOCIATION; RE THE UTILITY CONTRACTORS' ASSOCIATION OF ONTARIO INCORPORATED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL (Oct.) 1041

Practice and Procedure — Adjournment — Board adjourning to allow complainant an opportunity to file particulars — Counsel for the complainant filing particulars after deadline imposed by Board — Board striking from the complaint the matters to which the counsel's particulars relate

JOSEPH BRANT MEMORIAL HOSPITAL, VS SERVICES LTD., AND C.U.P.E., LOCAL 1065; RE RONALD FILLION (June) 599

Practice and Procedure — Adjournment — Construction Industry — Construction Industry Grievance — Natural Justice — Related Employer — Sale of a Business — Witness — Board not permitting respondent in sale of a business application to be added as a respondent in a construction industry grievance where liability had already been determined — Adjournment request based on unavailability of counsel dismissed — Adjournment request based on hospitalization of key witness granted — Board fixing further hearing dates on peremptory basis — Adjournment of those dates on consent of all parties denied — Board dismissing allegations of bias and breach of rules of natural justice — Contempt of witness purged by his answering questions put to him — Sale of a business and related employer applications dismissed

RINO ZANETTE (1981) LTD.; RE L.I.U.N.A., LOCAL 607; RE L.I.U.N.A., LOCAL 607; RE RINO ZANETTE (1981) LTD., SAULT HOLDINGS LIMITED, ZANETTE INVESTMENTS INC., AND 444348 ONTARIO LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 607; RE RINO ZANETTE LIMITED, RINO ZANETTE (1981) LTD., 444348 ONTARIO LIMITED, ZANETTE INVESTMENTS INC., SAULT HOLDINGS LIMITED (Sept.) 923

Practice and Procedure — Adjournment — Duty to Bargain in Good Faith — Remedy — Unfair Labour Practice — Request for supplementary reasons denied — Decisions speak for themselves — Adjournment denied — Parties ordered to execute collective agreement as remedy for breach of bargaining duty

NORTEC AIR CONDITIONING INDUSTRIES LTD; RE I.B.E.W., LOCAL 2228; RE VAN HOA QUACH ON HIS OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF NORTEC AIRCONDITIONING INDUSTRIES LTD. (Sept.) 910

Practice and Procedure — Bargaining Unit — Certification — Applicant challenging the inclusion of an employee in the bargaining unit at pre-hearing vote meeting with officer — Employee's ballot segregated and not counted — Vote tied — Applicant withdrawing challenge after vote — Employer then taking position that employee should be excluded from unit — Board determining that once applicant withdrew its challenge the employee was included in the unit — Party cannot raise a challenge after a vote has been counted

G.W. MARTIN VENEER LIMITED; RE I.W.A. (Jan.) 21

Practice and Procedure — Bargaining Unit — Certification — Reconsideration — Request to amend style of cause from corporate entity to internal operational unit — Request denied — Only corporate name to be included in style of cause — Restriction of bargaining rights indicated in bargaining unit description

OMNI HEALTH CARE LTD.; RE O.N.A. (June) 609

Practice and Procedure — Bargaining Unit — Certification Where Act Contravened — Respondent arguing that part-time employees and students should be excluded from the unit — Respondent not having a history of employing such persons but plant only in operation a short time — Board not departing from its approach of including such persons in unit — Applicant objecting to the officer disclosing the count — Disclosure ordered — Count particularly important where s. 8 relief requested.

KUHLMAN PLASTICS OF CANADA LTD.; RE U.A.W.; RE GROUP OF EMPLOYEES..... (Dec.)

1284

Practice and Procedure — Certification — Charges — Membership Evidence — Whether Board should entertain allegations with respect to the circumstances in which membership evidence was obtained when allegations not asserted in a timely fashion in accordance with section 72 of the Board's Rules of Procedure — Board having a discretion to hear the allegations — Only prejudice asserted is the prejudice of delay — No significant delay here because hearings continuing for the purpose of hearing non-pay allegation — Board consenting to the introduction of evidence with respect to the untimely allegations — Board explaining its "usual investigation" with respect to non-pay allegations — Further hearings scheduled

ESTONIAN RELIEF COMMITTEE IN CANADA; RE S.E.I.U., LOCAL 204 AFFILIATED WITH S.E.I.U., A.F. OF L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES..... (Nov.)

1167

Practice and Procedure — Certification — Construction Industry — Intervention filed by union requesting a hearing on the basis that it represented employees who might be affected by the application — Board declining to hold a hearing — Intervener not pleading any material facts on which it relies nor indicating relief requested — Certificates issuing

LABOUR COUNCIL DEVELOPMENT FOUNDATION; RE L.I.U.N.A., LOCAL 183; RE C.J.A., LOCAL 27..... (Feb.)

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Practice and Procedure — Certification — Construction Industry — Natural Justice — Board required to determine whether collective agreement bar to certification application — Board receiving *viva voce* and documentary evidence on that issue but insufficient time to receive oral submissions — Written submission requested — Intervener objecting to being deprived of opportunity of making oral submissions — Board considering factors such as its power to determine its own practice and procedure, the parties having had the opportunity of presenting witnesses, and expedition — Board ordering that written submissions be filed

CONSTRUCTION 2000, 704039 ONTARIO LIMITED, CARRYING ON BUSINESS AS; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES..... (Aug.)

749

Practice and Procedure — Certification — Construction Industry — Officer appointed to inquire into whether persons at work on application date and nature of work performed — Respondent refusing to make its employees available to the officer and to supply the last known addresses of persons it says are no longer employed by it — Board directing respondent to comply — Board will accept applicant's claim as correct if respondent refuses to cooperate

PURIGAN MASONRY LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Sept.)

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Practice and Procedure — Certification — Construction Industry — Parties — Petitioner attending hearing as an observer but not participating — No notice of continuation of hearing sent to petitioner — Whether Board should adjourn in order for notice to be given — Petitioner not entitled to notice of continuation of hearing — One must attend hearing as a party in

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- Practice and Procedure — Certification — Construction Industry — Respondent employer requesting a hearing on basis that some employees not understanding the nature of the certification process as a result of their inability to understand English — Board not allowing employer to speak for employees absent allegations of fraud or intimidation — Certificates issuing without a hearing
- IMAGE PAINTERS L.M. INC.; RE P.A.T., LOCAL 1891(Aug.) 807
- Practice and Procedure — Certification — Construction Industry — Termination — Timeliness — Voluntary Recognition — Respondent and intervener raising bar of voluntary recognition agreement in their pleadings — Neither appearing at Board hearing — Certification application treated as termination application under s. 60 — Board declaring that intervener not entitled to represent the employees in the unit at the time the voluntary recognition agreement was entered into — Certificates issuing
- PRY-CON CONSTRUCTION INC.; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A., LOCAL 493 (July) 698
- Practice and Procedure — Certification — Employee Reference — Parties agreeing to bargaining unit description but in dispute as to whether certain persons were in the unit so described — Hearing waived and parties agreeing to appointment of officer under s. 106(2) — Board declining to appoint officer — Appropriate procedure is for parties to make an attempt to resolve their dispute — Certificate issuing
- CADDIFORD INVESTMENTS LIMITED; RE U.S.W.A.....(Jan.) 12
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- PEBRA PETERBOROUGH INC.; RE PEBRA PETERBOROUGH EMPLOYEES ASSOCIATION; RE C.A.W.....(Jan.) 76
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RINO ZANETTE (1981) LTD.; RE L.I.U.N.A., LOCAL 607; RE L.I.U.N.A., LOCAL 607; RE RINO ZANETTE (1981) LTD., SAULT HOLDINGS LIMITED, ZANETTE INVESTMENTS INC., AND 444348 ONTARIO LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 607; RE RINO ZANETTE LIMITED, RINO ZANETTE (1981) LTD., 444348 ONTARIO LIMITED, ZANETTE INVESTMENTS INC., SAULT HOLDINGS LIMITED (Sept.) 923

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Related Employer — Practice and Procedure — Sale of a Business — By letter applicant seeking to add 8 additional respondents and requesting a new terminal date — No particulars provided — Notwithstanding sections 1(5) and 63(3), Rules of Procedure and natural justice require an applicant to provide written particulars of both the allegations of fact and relief sought — Pre-hearing conference ordered

A. REISMAN CONSTRUCTION LIMITED, ET AL.; RE C.J.A., LOCAL 27 (Jan.) 1

Remedies — Abandonment — Bargaining Rights — Bargaining Unit — Certification — Collective Agreement — Duty of Fair Representation — Ratification and Strike Vote — Unfair Labour Practice — UFCW having municipal-wide bargaining rights — Employer opening up new plant in municipality — Employees in new plant told by employer they were not represented by a union — Union not consulting employees in new plant before concluding collective agreement with terms and conditions of employment alleged to be inferior — Motion brought by RWDSU to set aside collective agreement dismissed — Employees at new plant initially covered by collective agreement at old plant — Parties free to divide unit in two — Division of unit not resulting in abandonment of bargaining rights — Employees at new plant not participating in strike or ratification votes at old plant — Even if technical breach of s. 72(5), no remedial response warranted — Union breaching fair representation duty by failing to consult employees at new plant before concluding agreement and by failing to conduct a ratification vote — Whether Board has jurisdiction to set aside collective agreement as a remedy where employer not found to have violated the Act — Damages awarded but Board declining to exercise jurisdiction to set aside agreement — Certification application of RWDSU dismissed

CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC; RE U.F.C.W., LOCAL 175 AND U.F.C.W., AFL:CIO:CLC; RE JOHN HENSON, ET AL. (Dec.)

1211

Remedies — Adjournment — Duty to Bargain in Good Faith — Practice and Procedure — Unfair Labour Practice — Request for supplementary reasons denied — Decisions speak for themselves — Adjournment denied — Parties ordered to execute collective agreement as remedy for breach of bargaining duty

NORTEC AIR CONDITIONING INDUSTRIES LTD; RE I.B.E.W., LOCAL 2228; RE VAN HOA QUACH ON HIS OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF NORTEC AIRCONDITIONING INDUSTRIES LTD. (Sept.)

910

Remedies — Charter of Rights and Freedoms — Collective Agreement — Construction Industry — Picketing — Strike — Unfair Labour Practice — Voluntary Recognition — Picket lines set up by Labourers Union causing members of Carpenters Union to engage in an unlawful strike — Employers struck deciding to sign collective agreements with Labourers Union — Whether a union in a legal strike position can picket other companies at geographically distinct sites when those companies are not assisting the employer with the performance of any of the struck work — Restricting picketing would be a reasonable limit within the meaning of the Charter — Picketing found to be in breach of the Act — Purpose of picketing was to induce employers to grant bargaining rights to Labourers Union — Board granting declaratory relief only — Collective agreements not nullified

BAY-TOWER HOMES COMPANY LTD., L.I.U.N.A., LOCAL 183, ET AL.; RE C.J.A., LOCAL 27..... (Mar.)

259

Remedies — Collective Agreement — Reconsideration — Strike — Unfair Labour Practice — Board dealing with whether return-to-work protocol contained in respondent's proposal for a collective agreement discriminatory — Board making interim order directing the respondent to return the striking employees to work pending the disposition of the matter

SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES..... (Mar.)

322

Remedies — Construction Industry Grievance — Damages — Grievance alleging that respondent violated collective agreement by not convening a mark-up meeting before assigning the work of installing pipe — Board dismissing argument that this was a work assignment dispute — Respondent violating collective agreement — Board awarding damages for losses

caused by the failure to hold the mark-up meeting but denying prospective mandatory order

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE (Dec.)

1303

Remedies — Discharge — Health and Safety — Furniture handler discharged for refusing to lift hutch — Worker feared his back would be injured — Another worker lifted hutch — OHSA violated — Worker had reasonable grounds to refuse to lift the hutch without assistance — Other worker not injuring himself not much help in determining whether reasonable grounds — Worker admitting he would have left job soon anyway — Compensation only awarded

ART SHOPPE; RE MARK ENGLEDEEN (Aug.)

729

Remedies — Duty to Bargain in Good Faith — Termination — Timeliness — Unfair Labour Practice — Breach of good faith bargaining duty — Parties ordered to sign collective agreement — Collective agreement to have effect as of the date it would have been signed if not for the unfair labour practice — Termination application filed after that time rendered untimely

CANTON-EAST FERRIS — TOWNSHIP; RE U.F.C.W., LOCAL 175; RE ROBERT R. VOYER; RE MR. ROBERT R. VOYER; RE U.F.C.W., LOCAL 175 (Sept.)

866

Remedies — Duty to Bargain in Good Faith — Unfair Labour Practice — Union breaking away from Ad Hoc Committee established to bargain the issue of pensions with the employer jointly with other bargaining agents — Employer breaching bargaining duty by pressing to impasse its position that the issue of pensions be bargained under the aegis of the Committee and by refusing to otherwise receive and negotiate the union's pension proposals — Posting not ordered but decision to be sent to all bargaining unit members — Damages denied because Board not convinced that unsuccessful strike would not have occurred but for the employer's position on negotiating pensions through the Committee

UNIVERSITY OF WINDSOR; RE C.U.P.E., LOCAL 1001; RE S.E.U., LOCAL 210; RE SUSAN DUFOUR (Dec.)

1351

Remedies — Interference in Trade Unions — Unfair Labour Practice — Employees seeking permission to leave work early to attend strike preparation meeting — Permission to leave refused or revoked — Employees suspended for two or three days on grounds of insubordination after leaving work without permission — Unfair labour practice complaint dismissed — Board jurisprudence indicating that interests must be balanced — Board not determining whether Act violated because it would not in any event grant the remedies requested by the union

DEL EQUIPMENT LIMITED, DEL HYDRAULICS LIMITED AND EDINBURGH ELECTRIC LIMITED; RE C.A.W. (Dec.)

1248

Remedies — Practice and Procedure — Unfair Labour Practice — Board directing that grievor be reinstated and compensated — Complainant requesting that Board file its decision in court — Respondent not responding to allegation of non-compliance with Board order — Board filing its determination in court except for its remedial direction concerning compensation for lost wages — Board remaining seized with respect to compensation

M & K PLASTIC PRODUCTS LTD.; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE PROFESSIONAL & TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351 (June)

601

Remedies — Practice and Procedure — Unfair Labour Practice — Continuing unwillingness of employer to deal with the union as bargaining agent for the employees — President and

Vice-President of employer personally liable for breaches of sections 64, 66 and 70 — Individual liability not depending on special circumstances — No remedy for some breaches because of delay

NEPEAN ROOF TRUSS LIMITED, CLAUDE OUELLETTE, HUBERT C. STEEN-
BAKKERS; RE C.J.A., LOCAL 1030(Jan.) 61

Remedies — Practice and Procedure — Unfair Labour Practice — Deviation from a usual pattern of seasonal hiring of fishing boat crew resulting in a failure to rehire persons who would normally have a reasonable expectation of being rehired — Board prepared to find a portion of a section that has not been pleaded by a party has been contravened if the evidence supports such a finding — Employer found to have discriminated against the fishermen — Change in hiring practice was a response to the union's attempts to organize — Reinstatement not ordered — Compensation awarded for two fishing seasons

SACO FISHERIES LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED
WORKERS' UNION..... (Oct.) 1087

Representation Vote — Bargaining Unit — Certification — Request for a second representation vote because one person who may have cast the deciding ballot resigned on the working day following the vote — Resignation after vote not warranting the taking of another vote — Objectors and respondent requesting after vote that bargaining unit be redefined so as to exclude employees in the engineering department — Untimely request dismissed

DOWTY CANADA ELECTRONICS LIMITED; RE C.A.W.; RE GROUP OF
EMPLOYEES.....(Nov.) 1158

Representation Vote — Bargaining Unit — Certification — Union asking for exclusion of professional engineers from bargaining unit — Union in a vote position regardless of exclusion — Two votes ordered — Ballots of engineers to be segregated in one vote — In other vote engineers asked whether they wish to be included in unit with other employees

DOWTY CANADA ELECTRONICS LIMITED; RE C.A.W. (Sept.) 882

Representation Vote — Certification — Certification Where Act Contravened — Intimidation and Coercion — Membership Evidence — Non-pay allegation substantiated — Board rejecting all cards collected by that collector but declining to reject Form 9 — Economic misrepresentation not leading Board to reject all membership evidence — Vote ordered

CAN-ENG METAL TREATING LTD.; RE C.A.W.; RE GROUP OF
EMPLOYEES..... (May) 444

Representation Vote — Certification — Union establishing sufficient support to warrant certification without recourse to a representation vote — Board examining policy reasons warranting the additional evidence of a representation vote — Board exercising discretion to not order vote — Certificate issuing

P.J. WALLBANK MANUFACTURING CO. LIMITED; RE C.A.W.; RE GROUP OF
EMPLOYEES.....(Mar.) 319

Representation Vote — Certification — Vote ordered and ballot box sealed — Union seeking leave to withdraw its application after the vote is held but before it is counted — Employees requesting that vote be counted — Board outlining role and interest of employees in a certification application — Board cannot insist that union pursue a certification application — Vote not counted — Application dismissed

COOPER CANADA LIMITED; RE BREWERY, MALT & SOFT DRINK WORKERS,
LOCAL 304; RE G.M.P., LOCAL 366..... (Sept.) 880

Representation Vote — Certification — Whether lead hands exercising managerial functions — One lead hand excluded from unit — Whether or not the ballots which had been ruled by

the Returning Officer to be spoiled ballots were in fact spoiled ballots — Board ruling that the choice of the voters who marked the ballots in question was not clear — Ruling of Returning Officer affirmed

ALUMINART PRODUCTS LTD.; RE U.S.W.A.; RE GROUP OF EMPLOYEES (June) 538

Representation Vote — Termination — Three employees relying on information contained in a letter from their employer as to when they could vote — Employees missing opportunity to vote — Objections to vote dismissed — Employees who ignore the Board's official notices do so at their own peril

CABLE TECH CO. LTD.; RE JOHN CAMPBELL; RE I.B.E.W., LOCAL 1590.. (June) 562

Right of Access — Union given access to bunkhouse area notwithstanding the fact that it was located within a secured portion of the employer's property on which the gold mine was located

NORAMCO MINING CORPORATION; RE L.I.U.N.A., LOCAL 493 AND SUD-BURY MINE, MILL & SMELTER WORKERS' UNION, LOCAL 598 (Apr.) 420

Sale of a Business — Adjournment — Construction Industry — Construction Industry Grievance — Natural Justice — Practice and Procedure — Related Employer — Witness — Board not permitting respondent in sale of a business application to be added as a respondent in a construction industry grievance where liability had already been determined — Adjournment request based on unavailability of counsel dismissed — Adjournment request based on hospitalization of key witness granted — Board fixing further hearing dates on peremptory basis — Adjournment of those dates on consent of all parties denied — Board dismissing allegations of bias and breach of rules of natural justice — Contempt of witness purged by his answering questions put to him — Sale of a business and related employer applications dismissed

RINO ZANETTE (1981) LTD.; RE L.I.U.N.A., LOCAL 607; RE L.I.U.N.A., LOCAL 607; RE RINO ZANETTE (1981) LTD., SAULT HOLDINGS LIMITED, ZANETTE INVESTMENTS INC., AND 444348 ONTARIO LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 607; RE RINO ZANETTE LIMITED, RINO ZANETTE (1981) LTD., 444348 ONTARIO LIMITED, ZANETTE INVESTMENTS INC., SAULT HOLDINGS LIMITED (Sept.) 923

Sale of a Business — Employer with established meat packing business acquiring a federally inspected plant and assets from trustee in bankruptcy — Bad will associated with predecessor employer due to allegations of selling tainted meat — Plant seven times larger than required — Employer having hope of expanding his business — Services of predecessor's plant manager retained — Few customers acquired — Board analyzing sale jurisprudence and finding no sale of a business — Subsequent failure of a business after it has been acquired need not negate a finding that there has been a sale of a business — Mere intention to acquire a business will not necessarily result in a declaration — Transfer of a federally inspected plant not analogous to "transfer of a licence" cases — Key elements of wholesale meat packing business are entrepreneurial ability and customer base — Application dismissed

CROWN PACKERS & REALTIES LTD., CROWN MEAT PACKERS LIMITED, CROWN DRESSED MEATS INC.; RE U.F.C.W., LOCAL 617P (Aug.) 752

Sale of a Business — Famous Players leasing theatre from city — Famous Players vacating theatre premises to show movies elsewhere — City taking possession and using theatre as a performing arts centre — No part of business sold to city — Application dismissed

BRANTFORD, THE CORPORATION OF THE CITY OF; RE I.A.T.S.E., LOCAL 582 (July) 648

- Sale of a Business — Interference in Trade Unions — Related Employer — Unfair Labour Practice — Drivers laid off when employer contracted out its trucking operations — Negotiations with laid off employees concerning the possibility of awarding some contracts to them — Employer refusing to sign contracts when it learned from union they might still be employees — Meetings with employees not breach of Act — Board not determining if refusal to award contracts breach of Act because not appropriate to grant remedy anyway — No sale of business or related employer — Complaints dismissed
- GLOBE AND MAIL, THE, DIVISION OF CANADA NEWSPAPERS LTD., ET AL.;
RE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87, T.N.G. (Apr.) 384
- Sale of a Business — Practice and Procedure — Related Employer — By letter applicant seeking to add 8 additional respondents and requesting a new terminal date — No particulars provided — Notwithstanding sections 1(5) and 63(3), Rules of Procedure and natural justice require an applicant to provide written particulars of both the allegations of fact and relief sought — Pre-hearing conference ordered
- A. REISMAN CONSTRUCTION LIMITED, ET AL.; RE C.J.A., LOCAL 27 (Jan.) 1
- Sale of a Business — Steinberg closing its food store and opening up an Ultra Mart store in the vicinity — Store site taken over by IGA — Whether sale from Steinberg to IGA — Board reviewing sale of a business jurisprudence in the retail food industry — Assumption that goodwill would attach to the location not sustainable because two stores in competition — No sale
- MIRACLE FOOT MART, STEINBERG INC. AND LOEB'S IGA; RE U.F.C.W.,
LOCAL 175 AND 633. (July) 679
- Sale of a Business — Vinyl window business going into receivership and then bankrupt — Consultant to predecessor company setting up company to produce vinyl windows — Successor purchasing assets, work in progress and some inventory from receiver — Nearly entire workforce of bankrupt company hired — Sale of a business found — Right to produce vinyl windows designed by consultant acquired directly from consultant not constituting substantial change in the character of the business
- DANT INDUSTRIES LIMITED, DUNWOODY LIMITED, WARRATT HOLDINGS
INC., AND ONE-VINYL WINDOW MFRS. LTD.; RE P.A.T. (Nov.) 1149
- Sale of a Business — Whether sale of a business from Skyline Hotel of its lounge to Master's Brew Pub — Lounge closed due to declining business — Integration of Skyline's facilities with those of Master's not necessarily leading to a conclusion of sale — Evidence indicating a landlord and tenant relationship only — Application dismissed
- MASTER'S BREW PUB & BRASSERIE, SKYLINE OTTAWA (1980) LIMITED AND
709212 ONTARIO LIMITED CARRYING ON BUSINESS AS; RE HOTEL, CLUBS,
RESTAURANTS AND TAVERN EMPLOYEES UNION, LOCAL 261 (Aug.) 827
- School Boards and Teachers Collective Negotiations Act — Bargaining Unit — Certification — Membership Evidence — Membership evidence mailed to union office with dollar meeting requirements of Act — Whether Part XI occasional teachers who teach in the French language should be excluded from a unit of occasional teachers who provide instruction in English — Cases indicating that either all-inclusive unit or separate unit of Part XI occasional teachers appropriate — Sufficient community of interest for all-inclusive unit here
- FRONTENAC-LENNOX AND ADDINGTON COUNTY ROMAN CATHOLIC SEPA-
RATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS'
ASSOCIATION (Sept.) 888
- School Boards and Teachers Collective Negotiations Act — Bargaining Act — Certification — Whether occasional teachers employed in French language schools should be included in

occasional teacher unit — Elementary unit including such teachers — Officer appointed to inquire into community of interest

OTTAWA BOARD OF EDUCATION; RE O.S.S.T.F. (June) 610

Sector Determination — Construction Industry — Construction Industry Grievance — Jurisdictional Dispute — Practice and Procedure — Issue of whether the work which is central to the referrals and the jurisdictional dispute is work in the ICI sector — Board deciding procedural context in which determination should be made — Sectoral determination to be made prior to considering any other issue — Panel which hears this issue will hear merits of jurisdictional dispute

DUFFERIN CONSTRUCTION COMPANY; RE C.J.A., LOCAL 27; RE THE FOUNDATION COMPANY OF CANADA LIMITED; RE L.I.U.N.A., LOCAL 183; RE DUFFERIN CONSTRUCTION COMPANY, A DIVISION OF ST. LAWRENCE CEMENT INC. AND C.J.A., LOCAL 27 (Nov.) 1164

Sector Determination — Parties — Whether persons having status to participate in a sectoral determination hearing — Person must have a direct connection with the project — Union entitled to intervene

BOARD OF GOVERNORS OF EXHIBITION PLACE, THE; RE U.A., LOCAL 46; RE L.I.U.N.A., LOCAL 183 (June) 560

Settlement — Construction Industry Grievance — Practice and Procedure — Minutes of settlement indicating that Board should “issue an order” — Parties must make clear which matters are to be the subject of an order — Board declining to make order

GREENLEAF DESIGNS LTD.; RE L.I.U.N.A., LOCAL 183 (Feb.) 150

Settlement — Duty of Fair Representation — Unfair Labour Practice — Complaint settled but terms not reduced to writing — Term of settlement that complainant would withdraw complaint — Inquiring into the merits of the complaint might have a deleterious effect on the Board's settlement process — Complaint dismissed

CLOUTIER, MADELEINE; RE C.A.W., LOCAL 195; RE PEERLESS-CASCADE PLASTICS LIMITED (Apr.) 375

Settlement — Duty of Fair Representation — Unfair Labour Practice — Union and employer entering into minutes of settlement — Amount received by union credited to its general account — Failure to credit money to benefit accounts or failure to recover benefits on behalf of complainants not breach of fair representation duty

PICKLES, RODNEY, ET AL.; RE C.J.A. LOCAL 785 (May) 516

Settlement — Unfair Labour Practice — Parties settling complaint pursuant to minutes of settlement — Parties seeking to have agreement issued as an order and to have the Board remain seized with respect to its implementation — Minutes not clear as to what order should be — Board not making any order nor remaining seized — Matter to be terminated in one year

BROWN MANUFACTURING LTD.; RE C.T.C.U. (July) 660

Strike — Charter of Rights and Freedoms — Collective Agreement — Construction Industry — Picketing — Remedies — Unfair Labour Practice — Voluntary Recognition — Picket lines set up by Labourers Union causing members of Carpenters Union to engage in an unlawful strike — Employers struck deciding to sign collective agreements with Labourers Union — Whether a union in a legal strike position can picket other companies at geographically distinct sites when those companies are not assisting the employer with the performance of any of the struck work — Restricting picketing would be a reasonable limit within the meaning of the Charter — Picketing found to be in breach of the Act — Purpose of picketing was to

- induce employers to grant bargaining rights to Labourers Union — Board granting declaratory relief only — Collective agreements not nullified
- BAY-TOWER HOMES COMPANY LTD., L.I.U.N.A., LOCAL 183, ET AL.; RE C.J.A., LOCAL 27 (Mar.) 259
- Strike — Collective Agreement — Reconsideration — Remedies — Unfair Labour Practice — Board dealing with whether return-to-work protocol contained in respondent's proposal for a collective agreement discriminatory — Board making interim order directing the respondent to return the striking employees to work pending the disposition of the matter
- SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Mar.) 322
- Strike — Construction Industry — On agreement of parties union members ordered to cease and desist from engaging in illegal strike activity including refusals of overtime — Members later refusing overtime on instructions from union — Union attempting to obtain higher hourly rate for its local — Board finding that union calling an unauthorized strike — Breach of s. 146(2)
- WATTS AND HENDERSON LTD., MECHANICAL CONTRACTORS ASSOCIATION OF ONTARIO, STATE CONTRACTORS INC.; RE U.A., LOCAL 46, SEAN O'RYAN, MITCH GRIFFITHS AND THE MEMBERS OF THE RESPONDENT LOCAL TRADE UNION EMPLOYED BY WATTS AND HENDERSON LTD., BILL WEATHERUP, MEMBERS OF THE RESPONDENT LOCAL TRADE UNION EMPLOYED BY STATE CONTRACTORS INCORPORATED (July) 721
- Strike — Construction Industry — Picketing — General contractor resubcontracting work to non-union employees in the face of the Carpenters' Union lawful province-wide strike — Carpenters' Union establishing picket line at subcontractor's primary job site — Picket line honoured by other unionized trades — Picketing of general contractor's job site by Carpenters' Union held to be in connection with a lawful strike — Application for a direction of unlawful strike dismissed
- SUTHERLAND-SCHULTZ LTD.; RE C.J.A., LOCAL 785 AND KARL BALL, U.A., LOCAL 527, AL STEFFLER, JIM HILKER, TED BENEDICT, RON HALLMAN, GARY ARNOTT AND KEITH ACTON, I.B.E.W., LOCAL 804, WAYNE LEHMAN, WALTER SCHLUETER, DAVID WORTON AND PETER WEBER, I.U.O.E., LOCAL 793 AND RON HUNT (June) 632
- Strike — Duty to Bargain in Good Faith — Interference in Trade Unions — Unfair Labour Practice — Letter sent by employer to employees setting out offer made to union during negotiations proper exercise of employer free speech — Second letter sent to most senior employees inviting contact with employer personally breach of bargaining duty and interference with union — Closure of part of business not motivated by anti-union considerations
- BAROUH EATON (CANADA) LTD. AND RON GIBBONS; RE TEAMSTERS UNION, LOCAL 938 (June) 549
- Strike — Jurisdictional Dispute — Complainant seeking interim order requiring a redistribution of the work in dispute — Only strike threat involving the complainant — Complainant cannot profit from its own illegal conduct — Board declining to make an interim direction or order
- NEWMARCH MECHANICAL LIMITED AND U.A., LOCAL 463; RE B.S.O.I.W., LOCAL 721 (Aug.) 840
- Strike — Jurisdictional Dispute — Natural Justice — Practice and Procedure — Reconsideration — Whether refusal of an interim order without either a formal hearing or consultation amounts to a denial of fundamental justice — No necessity for formal hearing — Board

having no obligation to consult if pleadings do not disclose a basis for making an interim order — Reconsideration dismissed

NEWMARCH MECHANICAL LIMITED AND U.A., LOCAL 463; RE B.S.O.I.W.,
LOCAL 721(Aug.) 840

Strike — Jurisdictional Dispute — Work assigned to Labourers Union — Alleged threat by Carpenters Union to install a picket line if work not re-assigned — Several labourers laid off as a result of threat — Labourers Union seeking interim order that labourers be re-hired to complete the work — Work completed by end of application date — Board declining to make order that would be academic

MAXIBO INCORPORATED AND C.J.A., LOCAL 18; RE L.I.U.N.A.,
LOCAL 837(Aug.) 835

Strike — Reconsideration — Reconsideration of Board decision exercising discretion to decline to issue a strike declaration denied

MACMILLAN BATHURST INC.; RE C.P.U., LOCAL 1497, ET AL.(Mar.) 312

Termination — Certification — Construction Industry — Practice and Procedure — Timeliness — Voluntary Recognition — Respondent and intervener raising bar of voluntary recognition agreement in their pleadings — Neither appearing at Board hearing — Certification application treated as termination application under s. 60 — Board declaring that intervener not entitled to represent the employees in the unit at the time the voluntary recognition agreement was entered into — Certificates issuing

PRY-CON CONSTRUCTION INC.; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A.,
LOCAL 493(July) 698

Termination — Construction Industry — Applicant never obtained a referral slip with respect to his employment with the employer — Whether applicant to be included in the unit for purposes of s. 57(3) — Board finding respondent waived the referral slip requirement — *April Waterproofing* not applicable — Vote ordered

E.R. MASONRY LTD.; RE RICHARD NOLAN; RE L.I.U.N.A., LOCAL 1081 AND
L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL(July) 668

Termination — Construction Industry — Timeliness — Union certified pursuant to section 8 — Parties immediately bound by province-wide agreement — Termination application filed 10 weeks later during last two months of collective agreement — Application timely — Petition in certification case not an “unsuccessful application” which would allow the Board to exercise its discretion to bar the termination application

M & AL ROOFING LTD.; RE BRIAN MASSÉ; RE THE BUILT-UP ROOFERS,
DAMP & WATERPROOFING SECTION OF THE ONTARIO SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION, AND S.M.W., LOCAL 47(Aug.) 821

Termination — Construction Industry — Timeliness — Union obtaining bargaining rights through voluntary recognition — Parties immediately bound by ICI agreement — Termination application brought a few months later after the commencement of the last two months of the agreement — Whether application untimely by virtue of s. 123(2) — Open period in s. 123(2) found to be in addition to open period in s. 57(2) — Application timely

PINO DRYWALL CONSTRUCTION OF OTTAWA LTD.; RE FRANCO PEPE; RE
ONTARIO PROVINCIAL COUNCIL, C.J.A. AND C.J.A., LOCAL 2041(July) 692

Termination — Duty to Bargain in Good Faith — Remedies — Timeliness — Unfair Labour Practice — Breach of good faith bargaining duty — Parties ordered to sign collective agreement — Collective agreement to have effect as of the date it would have been signed if not

- for the unfair labour practice — Termination application filed after that time rendered untimely
- CANTON — EAST FERRIS — TOWNSHIP; RE U.F.C.W., LOCAL 175; RE ROBERT R. VOYER; RE MR. ROBERT R. VOYER; RE U.F.C.W., LOCAL 175 (Sept.) 866
- Termination — Parties — Petition — Timeliness — Application filed on same day as Minister appointed conciliation officer timely — Applicant having status to bring application as an employee in the bargaining unit although not a member in good standing of the union — Vote ordered
- IDEAL RAILINGS LTD.; RE EVARISTO ROMERO; RE C.J.A., LOCAL 27..... (July) 674
- Termination — Parties — Practice and Procedure — Termination application referring to District Council and one local — Province-wide agreement naming District Council and all affiliated union locals as parties — International, District Council and all affiliated union locals necessary parties — Applicant allowed to amend title of application to include all those local unions named in the collective agreement as respondents
- DOUBLE S CONSTRUCTION, 657572 ONTARIO INC. C.O.B. AS; RE MICHAEL VAN LANDEGHEM, TRACY VAN LANDEGHEM AND TERRY MANZUTTI; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNION L.I.U.N.A., LOCAL 1036 (Aug.) 800
- Termination — Petition — Fifty percent of bargaining unit comprised of employees who were closely related to the owners of the business — Signatures of family members on petition found voluntary — Vote ordered
- KING GEORGE HOTEL, REAL DELAGE; RE GILLES DELAGE; RE HOTELS, CLUBS, RESTAURANTS AND TAVERNS EMPLOYEES' UNION, LOCAL 261 (Dec.) 1278
- Termination — Representation Vote — Three employees relying on information contained in a letter from their employer as to when they could vote — Employees missing opportunity to vote — Objections to vote dismissed — Employees who ignore the Board's official notices do so at their own peril
- CABLE TECH CO. LTD.; RE JOHN CAMPBELL; RE I.B.E.W., LOCAL 1590.. (June) 562
- Timeliness — Abandonment — Certification — Conciliation — Whether twelve month bar to certification application after appointment of conciliation officer in effect — Applicant alleging *de facto* abandonment of bargaining rights by incumbent union prior to appointment of conciliation officer — Applicant also arguing that for bar to apply there must be a reasonable expectation that the incumbent union's bargaining rights will subsist for the twelve month period — Board finding that bar in effect — Application dismissed as untimely
- BOISE CASCADE CANADA LTD.; RE C.P.U.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A.; RE I.B.E.W., LOCAL 559 ... (Jan.) 9
- Timeliness — Certification — Construction Industry — Practice and Procedure — Termination — Voluntary Recognition — Respondent and intervener raising bar of voluntary recognition agreement in their pleadings — Neither appearing at Board hearing — Certification application treated as termination application under s. 60 — Board declaring that intervener not entitled to represent the employees in the unit at the time the voluntary recognition agreement was entered into — Certificates issuing
- PRY-CON CONSTRUCTION INC.; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A., LOCAL 493 (July) 698
- Timeliness — Certification — Membership Evidence — Employee objectors requesting an extension of the terminal date — Board exercising its discretion not to extend terminal date —

Time is of the essence in certification matters — Both Form 6 and poster clearly explain how objections must be filed — Certificate issuing

MATHERS CONCRETE, PAVAGE ET BÉTONNIÈRE ST-EUSTACHE LTÉE, CARRYING ON BUSINESS AS; RE TEAMSTERS', LOCAL 230; RE DANIEL OLIVIER ON BEHALF OF A GROUP OF EMPLOYEES(Aug.) 830

Timeliness — Certification — Petition — Petition left on deserted desk at Board offices after office hours on terminal date not "received" by Board in accordance with Rules — Petition untimely — Certificate issuing

DURSO STEEL LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES..... (Sept.) 883

Timeliness — Construction Industry — Termination — Union obtaining bargaining rights through voluntary recognition — Parties immediately bound by ICI agreement — Termination application brought a few months later after the commencement of the last two months of the agreement — Whether application untimely by virtue of s. 123(2) — Open period in s. 123(2) found to be in addition to open period in s. 57(2) — Application timely

PINO DRYWALL CONSTRUCTION OF OTTAWA LTD.; RE FRANCO PEPE; RE ONTARIO PROVINCIAL COUNCIL, C.J.A. AND C.J.A., LOCAL 2041 (July) 692

Timeliness — Construction Industry — Termination — Union certified pursuant to section 8 — Parties immediately bound by province-wide agreement — Termination application filed 10 weeks later during last two months of collective agreement — Application timely — Petition in certification case not an "unsuccessful application" which would allow the Board to exercise its discretion to bar the termination application

M & AL ROOFING LTD.; RE BRIAN MASSÉ; RE THE BUILT-UP ROOFERS, DAMP & WATERPROOFING SECTION OF THE ONTARIO SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AND S.M.W., LOCAL 47(Aug.) 821

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